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A

ACTIONS.

See PRACTICE, CIVIL.

ADMINISTRATION.

1. *Administration — Partnership Estates — Appeal — What bond required.* — A surviving partner administering on partnership effects has all the rights, incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.)—Bruening v. Oberschelp, 276.
2. *Administration — Debts from Administrator to Testator, when Assets.* — Where a banking house issued a certificate of deposit to one who afterward died, and a member of the banking house became administrator, the debt evidenced by the certificate will be considered assets in his hands, within the meaning of the twenty-eighth section of the second article of the act concerning administrators, even though the certificate never came into his possession. (R. C. 1855, p. 133; Gen. Stat. 1865, p. 492, § 31.) And it is immaterial that the debt was a partnership one, as, under the laws of this State, each member is liable individually for the obligations of the firm.—Dubois's Adm'r v. Walsh, 272.
3. *Probate Court — Appeals — Bonds — Judgment against Securities.* — The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court.—*Id.* 273.
4. *Administration — Set-off against suit of Administrator, when admissible.* — The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.—Shanon's Adm'r v. Dinan, 269.

ADMINISTRATION—(*Continued.*)

5. ***Administration — Payment of debts — Claims of heirs for shares in Estate, when brought.***—Before heirs have any right of action against the administrator for their distributive share of the estate, the debts against the estate must not only be paid, but distribution must be ordered by the appropriate tribunal.—*Id.*

6. ***Administration — Statute, construction of.***—Section 2, chap. 122, Gen. Stat. 1865, contemplates something more than the mere allowance against the estate of the deceased of an account for the purchase money of the real estate therein mentioned, to pass the title and complete the contract. The executor or administrator can use the assets to complete the payment by order of the court; but before the court can make the order it must examine into the affairs and condition of the estate, and determine whether it will be beneficial to the estate or injurious to creditors. A judicial determination of the facts is necessary before the order can be made or the subject passed upon.—Lake, Adm'r, v. Meier, Adm'r, 389.

7. ***Co-securities — Agents.***— Where A. and B. were co-securities on the bond of an administrator who became insolvent, and A. as security was compelled to pay the amount in default, the fact that prior to the execution of the bond B. had entered into an agreement with the administrator to act as his agent in receiving and paying out moneys belonging to the estate of the deceased, in in consideration of the payment to him of a portion of the commissions allowed the administrator by court, does not deprive B. of his position as surety and render him liable to A. as principal on the bond. That he was entitled by law primarily to administer, and waived his rights in favor of a public administrator, or that he had an interest in the estate, will not alter the case.—Seeley's Adm'r v. Beck, 143.

8. ***Agent — Partner.***— Under such circumstances, B. would be liable only upon the assumption that the agreement created a partnership between himself and the administrator, and no partnership can exist in the office of administrator.—*Id.*

AGENCY.

1. ***Agents of Corporations — Simple Contracts — Agency.***—The conveyance of real property must purport to be made and executed by the corporation acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.—Musser v. Johnson, 74.

2. ***Married Women — Separate Real Estate — Agents — Contract made by — Liability of Third Persons to Principal for.***— Although land belongs to a *femme covert* in her sole individual right, it is undoubtedly true that her husband is seized with her in the possession, and she must be held to be acting as his agent. But a man may delegate an agency to his wife, as well as to any other person; or he may ratify her acts as agent, although done without previous authorization. And an agent may make a contract in his own name, whether he describes himself as an agent or not, and his principal will be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit was given to the agent and it was intended by both parties that no resort should in any event be had by or against the principal upon it.—Grant v. White, 286.

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3. *Foreign Insurance Companies — Agents.*—Foreign insurance companies are bound by the acts of their local agents, acting within the scope of their general authority, without any immediate knowledge of the transaction on the part of the company.—Franklin v. Atlantic Ins. Co. 456.

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ASSIGNMENTS.

1. *Assignment — Non-resident Creditors — Conflict of Laws.*—Comity does not require a court to enforce a contract valid according to the laws of the place where it is made, if such enforcement would result to the manifest injury or detriment of the citizens of the country where the property is situated or the claim attempted to be enforced. But where all parties to a suit are residents of another State, and defendants had made an assignment of their property, in accordance with the laws of that State, for the benefit of their creditors, and an assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of and residing in that State, could not secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvent in this State.—Thurston v. Rosenfield, 474.

2. *Partnership — Assignment — Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.—Kitchen v. Reinsky, 427.

3. *Fraudulent Conveyances — Assignments — Secret Preferences.*—In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction, and be communicated to the other creditors and they do not object.—Sullivan's Adm'r v. Collier White Lead and Oil Company, 397.

4. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*—Such an agreement is against public policy, such an one as the law deems constructively fraudulent, and must therefore be held incapable of enforcement.—*Id.*

ATTACHMENTS.

1. *Garnishment—Trustee—Rents.*—Where one, as agent, collected rents for the trustee of another, and was garnisheed as debtor of the beneficiary, according to the decision of this court in the case of McIlvaine v. Smith (*ante*, p. 45), these rents were a trust fund in the hands of the trustee until paid over by

ATTACHMENTS—(*Continued.*)

him to the beneficiary, and the agent could not be made liable under this process, as the debtor of the beneficiary, for rents so collected as the agent of the trustee.—McIlvaine v. Lancaster, Garnishee, 96.

2. *Attachment—Order of Publication—Sufficiency.*—The order of publication required by the attachment act of 1855 (R. C. 1855, p. 246, § 23) did not itself operate an attachment, but was intended to impart notice to defendant of the pending attachment. And a publication notifying defendant that his property is "about to be attached," is sufficient, within the meaning of the statute.—Harris v. Grodner, 159.

3. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*—Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.—Kitchen v. Reinsky, 427.

4. *Partnership — Assignment — Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.—*Id.*

5. *Attachment—Plea in Abatement—Answer.*—Where, in a suit by attachment, defendant pleads in abatement, and the issue is found in his favor, and he afterward answers, setting up the defense that neither plaintiff nor defendant resided in the county in which the suit was brought, the ruling of the court in causing the same to be stricken out was erroneous. Under the 42d section of the present attachment act (Gen. Stat. 1865, p. 567), the suit should have been proceeded upon to final judgment as though commenced by summons alone; and in suits so commenced, one of the parties must reside in the county where suit is brought in order to confer jurisdiction. (Gen. Stat. 1865, p. 658, § 1.) Hence, the answer, if true, was a complete bar to the action.—Peery v. Harper, 131.

See ASSIGNMENTS, 1. FRAUDULENT CONVEYANCES. PRACTICE, CIVIL. TRIALS, 14.

AUDITOR, COUNTY.

1. *County Auditor—Claim against County, how allowed.*—No authority is conferred upon the county auditor in any case to draw a warrant upon the county treasury; nor is his opinion conclusive to the court upon the correctness of any claim against the county. All warrants upon the treasury must be ordered by the court itself.—State ex rel. McNeil v. County of St. Louis, 496.

2. *Account for Services, etc., how allowed against Circuit Court—Construction of Statute.*—An account for services in attending the Circuit Court of St. Louis county, and for stationery furnished thereto, should be audited and allowed by the Circuit Court, under the provisions of the general law relating

AUDITOR, COUNTY—(*Continued.*)

to this subject. (Gen. Stat. 1865, p. 540, §§ 41-2.) The special law relating to county auditor (Adj. Sess. Acts 1859, p. 448) has no application to claims of this character.—*Id.*

B

BILLS AND NOTES.

1. *Promissory Note — Equitable Defenses — Parol Contract.* — Where the answer to a suit on a promissory note denied the consideration implied by the use of the words "value received" in the body of the note, and the evidence tended to show a special contract between the maker and payee, at the time of the execution of the note, by which the former was to have a definite time to ascertain the value of a certain patent for which the note was given, and the evidence further tended to show that the patent was of no value whatever, such evidence constituted a good defense to the note sued on. — Benton v. Klein, 97.
2. *Promissory Note — Place of Payment — Alterations.* — Where words designating place of payment on a promissory note are not incorporated in the body of the contract itself, nor in any manner annexed to the instrument by the maker for the purpose of fixing a place of payment, they are to be taken as a mere memorandum, and therefore immaterial. In a contest between holder and indorser, such an addition or memorandum, without the knowledge and consent of the latter, has been held sufficient to discharge him. As to the maker, the rule of law goes to the extent that he is generally and universally liable, and demand at a place designated in the note is not a condition precedent of payment.— American National Bank v. Bangs, 450.
3. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.* — Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for one thousand dollars, and in pursuance of this arrangement the property was conveyed to defendants: *Held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker, notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.— Kratz v. Stocke, 351.
4. *Contracts, executed and executory.* — Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.—*Id.*
5. *Deeds of Trust — Notes — Priority of Payment — Special Contract.* — The principle of law that, where a deed of trust secures several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in which they mature, can have no application to a case where the parties have specially agreed that payments shall be made transversely, and that the note

BILLS AND NOTES—(*Continued.*)

last falling due shall have the priority of lien. And it does not alter the case that, by a provision of the deed, the grantor was expressly authorized to pay off the note first maturing at any time. This provision does not empower him to use the property encumbered by the trust for that purpose, without the consent or approbation of the securities upon the last maturing note.—Lamme's Adm'r v. Lamme, 153.

6. *Promissory Note — Verdict — Judgment.*—In an action upon a promissory note, where the answer simply denied the execution of the note, and the cause was submitted to the jury, it was their duty, under the provisions of Gen. Stat. 1865, chap. 169, §§ 21, 26, not simply to find a general verdict for plaintiff, but also to assess the amount due upon the judgment; and the court is not authorized to invade the province of the jury, and, in case of a general verdict by them, to proceed to ascertain the amount due upon the note and render judgment thereon.—Snadon's Adm'r v. Nickell, 169.

7. *Trial — Petition — Notes, treated as evidence of debt — What time given defendant to answer.*—Where the cause of action set out in the petition was for work and labor done, with a separate statement of the amount of each account, coupled in every case with reference to papers attached to the petition in the following form: "as will more fully appear by the evidence of indebtedness herewith filed" — it was immaterial to inquire whether these "evidences of indebtedness" were, in point of fact, notes for the direct payment of money or not. Plaintiff having elected to declare upon the original cause of action in this manner, defendant was entitled to six days within which to plead; and the court will, on motion at a subsequent term, the irregularity being shown to its satisfaction, set aside a judgment given for plaintiff within that time, or do whatsoever the justice of the case may require.—Smith v. Best, 185.

BOATS AND VESSELS.

1. *Boats and Vessels—Lien.*—Decision in Cavender v. Str. Fanny Barker, 40 Mo. 235, affirmed.—Joyall v. Str. Goldfinch, 455.

BRIDGES.

Per HOLMES, Judge.

1. *County Bridges—Statute—Common Law Remedies.*—The mode of compensation to owners of lands adjoining county bridges, prescribed by the twenty-first section of the chapter concerning bridges (Gen. Stat. 1865, p. 299), must be held to be exclusive of common law remedies.—Schmidt v. Densmore, 225.

2. *County Bridges — Statute, what authority given by.*— The authority to take rock and timber from adjoining private lands, conferred by that section, is broad enough to embrace all the specified cases of building and repairing county bridges.— *Id.*

3. *County Bridges — Commissioner — Contractor — Agency, how given.*— The County Court, the commissioner, and the contractor or undertaker, were all alike the agents of the county, and derived their powers and authority from the provisions of the law. The commissioner could not only take the necessary materials for building the bridge, in person, but he might cause them to be taken by his proper agents. And it was not necessary that the authority should be given by express words in the contract. It resulted from the very nature of the employment.— *Id.*

BRIDGES—(*Continued.*)

4. *Trespasses — Act concerning, contemplates what.*— The act concerning trespasses (Gen. Stat. 1865, ch. 76, § 1) contemplates voluntary or willful trespasses only, which are committed without any lawful right, and it inflicts penalties as upon a wrong-doer.— *Id.*

5. *County Bridges — Materials for building, how may be taken under Statute.* The clause in a contract between a county commissioner and a contractor for building a county bridge, which provides that said contractor was "to furnish all the material required for said bridge," does not exclude the authority conferred by the statute to procure these materials by taking them from the adjoining lands, in case they could not be purchased elsewhere. If such an agreement divested him of the powers conferred on him by statute through the County Court and the commissioner, and by virtue of the agency created by the contract itself, it would be in contravention of the law, and would exceed the lawful authority of the commissioner, and would therefore be void.— *Id.*

6. *County — Payment by, for material chargeable to contractor — How construed.*—The county being compelled by operation of law to pay money which by the terms of the contract the contractor was bound to pay, as between him and the county, it would amount to a payment made at his request and for his use.—*Id.*

Per CURIAM.

7. *Eminent Domain, not given by implication.*— The power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language.— *Id.*

8. *County Bridges — Statute — Construction.*— The twentieth and twenty-first sections of the chapter in relation to bridges (Gen. Stat. 1865) were intended to apply only to cases where the county commissioner either repairs or builds the bridge by the direct employment of some person, when the contractor has failed to comply with his covenants, and have no application to the original contractor; and in that case the county pays for the materials and recovers their value, as well as the price paid for the labor of repairing, from the contractor who is in default.— *Id.*

C

CARRIERS.

1. *Contracts — Bailments — Carriers — Exceptions to Liabilities — Practice.*— In an action against a carrier, the plaintiff is not bound to show negligence on the part of the carrier, in the first instance; all that is necessary to charge the carrier is to prove the delivery of the goods to him to be carried, and the burden of accounting for them is thrown upon him; and if he wishes to exonerate himself from liability, he must show either a safe delivery of the goods, or prove that the loss occurred by one of the causes excepted in his undertaking.—Levering v. Union Trans. & Ins. Co., 88.

2. *Contracts — Bailments — Carriers — Exceptions to Liabilities.* — A carrier may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by mistake or accident; but he cannot exempt himself from

CARRIERS—(*Continued.*)

losses caused by a neglect of that degree of diligence which the law casts upon him in his character of bailee. The obligation of the carrier does not originate in contract, but it is a duty the law imposes upon him in consideration of the nature of his employment; and if he assumes the calling, he has no power over the duties which the law annexes to that calling. It is the duty of a common carrier to receive whatever goods are offered to him for transportation in the usual course of his employment, and he cannot vary his liability by inserting conditions in his acceptance of goods. To have this effect there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, cannot be undermined and frustrated by the design and circumvention of artfully prepared printed receipts thrust upon the public, without the opportunity of fair assent, in the press and hurry of railroad travel.—*Id.*

3. *Contracts — Bailments — Common Carriers — What care required.* — The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the common carrier, although he may by his contract restrict his liability as insurer, is held to that different and higher degree of diligence commensurate with the duties he assumes.—*Id.*

See RAILROADS.

CITY ORDINANCES.

1. *City Ordinance — Market Stand — Paving Contract — Who liable for — Construction of Statute.* — The city of St. Louis is not the "occupant" of that portion of a street which has been set apart by ordinance as a stand for market wagons during certain hours of the day, within the meaning of the ordinance relating to the engineer department (Rev. Ord. 1866, p. 329, § 21), and the owners of property fronting on portions of streets so set apart are liable to a contractor with the city of St. Louis, upon a certified tax bill, for cost of repaving the same.—Bixler v. Hagan, 367.

2. *City Ordinance — Paving Contract — City, when liable for as "occupant of property," etc.* — The city of St. Louis becomes chargeable for expense of repaving, "as owner or occupant of property," within the meaning of the twenty-first section of that ordinance, only when "owner or occupant" fronting upon the street sought to be repaved. (Same ordinance, § 18.) — *Id.*

See PRACTICE, CIVIL. PLEADINGS, 3, 4.

CONFLICT OF LAWS.

1. *Assignment—Non-resident Creditors—Conflict of Laws.*—Comity does not require a court to enforce a contract valid according to the laws of the place where it is made, if such enforcement would result to the manifest injury or detriment of the citizens of the country where the property is situated or the claim attempted to be enforced. But where all parties to a suit are residents of another State, and defendants had made an assignment of their property, in accordance with the law of that State, for the benefit of their creditors, and an assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of and residing in that State, could not secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvent in this State.—Thurston v. Rosenfield, 474.

CONSTITUTION.

1. *Constitution—Voters—Oaths.*—The case of The State of Missouri v. Cummings, decided in the Supreme Court of the United States, applies to all cases where the right to exercise any trade, calling, or profession, without taking the oath prescribed by the new constitution of Missouri, has been questioned, but not to the case of a voter. (Blair v. Ridgley, 41 Mo. 63, affirmed.)—State v. Neal, 119.

2. *State Convention—Powers.*—The framers of the new constitution had the authority to declare it in full force without making provision to submit it to the voters of the State; and their power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument, cannot be seriously questioned. The ordinance had in itself every element necessary to give it legal force and effect, and was, therefore, binding upon the voter.—*Id.*

CONSTITUTION OF THE UNITED STATES.

See REVENUE, 11, 12. CONSTITUTION, 1.

CONTRACT.

1. *Contract—Assignment.*—Where a contract does not stipulate for the personal services, knowledge, skill, and experience of another, but for work which might be done as well by a third person as by the contractor himself in person, such a contract may be assigned, and the assignee may recover upon it. (Leahy v. Dugdale, 27 Mo. 437, affirmed.)—City, to use of Sullivan, v. Clemens, 69.

2. *Contracts—Bailments—Carriers—Exceptions to Liabilities—Practice.*—In an action against a carrier, the plaintiff is not bound to show negligence on the part of the carrier, in the first instance; all that is necessary to charge the carrier is to prove the delivery of the goods to him to be carried, and the burden of accounting for them is thrown upon him; and if he wishes to exonerate himself from liability, he must show either a safe delivery of the goods, or prove that the loss occurred by one of the causes excepted in his undertaking.—Levering v. Union Trans. and Ins. Co., 88.

3. *Contracts—Bailments—Carriers—Exceptions to Liabilities.*—A carrier may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by mistake or accident; but he cannot exempt himself from losses caused by a neglect of that degree of diligence which the law casts upon him in his character of bailee. The obligation of the carrier does not originate in contract, but is a duty the law imposes upon him in consideration of the nature of his employment; and if he assumes the calling, he has no power over the duties which the law annexes to that calling. It is the duty of a common carrier to receive whatever goods are offered to him for transportation in the usual course of his employment, and he cannot vary his liability by inserting conditions in his acceptance of goods. To have this effect there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, cannot be undermined and frustrated by the design and circumvention of artfully prepared printed receipts thrust upon the public, without the opportunity of fair assent, in the press and hurry of railroad travel.—*Id.*

4. *Contracts—Common Carrier, care required.*—The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the

CONTRACT—(*Continued.*)

common carrier, although he may, by his contract, restrict his liability as insurer, is held to that different and higher degree of diligence commensurate with the duties he assumes.—*Id.*

5. *Contracts, Executed and Executory — Covenants — Lands — Vendor and Purchaser.* — There is a distinction been the rules which govern the relation of vendor and purchaser before and after the execution of the deed. While the contract remains executory, the purchaser has a right to demand a title clear of all encumbrances and defects. The vendor cannot recover without exhibiting an ability to comply with the stipulations and agreements contained in his covenants. An agreement to make a good and sufficient warranty deed is an agreement for the conveyance of a good title.—Wellman's Adm'r v. Dismukes, 101.

6. *Contract — Acceptance — Mutual Assent.* — Where a city council passed an ordinance, first accepting a written proposal touching the erection of certain machine-shops, etc., and then providing the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but "on such further conditions as may be deemed necessary," and further authorizing the mayor to enter into a written agreement relative to such proposition: *Held*, that the contract was not complete and could not be enforced against the city until its terms were fully agreed upon and the contract closed by writing. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time existed the requisite mutual assent to the same thing in the same sense.—Eads v. Carondelet, 113.

7. *Contract — Parol, must be put in writing, when.*—When a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form.—*Id.*

8. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.* — Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for $1,000, and in pursuance of this arrangement the property was conveyed to defendants: *Held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.—Kratz v. Stocke, 351.

9. *Contracts, executed and executory.*— Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.— *Id.*

10. *Contract — Endowment — Subscription.* — An agreement to contribute to an endowment fund when a certain sum of money is raised as a capital will be enforced where the capital to that amount consisted of interest-bearing notes made by persons of unquestioned solvency; and the money need not be

CONTRACT—(*Continued.*)

actually paid in. The amount was raised in accordance with the condition of such promise when the same was assured by the undertaking of solvent and responsible obligors.—Trustees of Westminster College v. Gamble, 411.

11. *Contract — Equity — Specific Performance.*—If a contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree a specific performance as it is to give damages at law.—Hardy v. Matthews, 406.

12. *Partnership—Contract.*—A contract made with a party is not binding upon a partnership into which he subsequently enters, unless the firm assent thereto.—Deere v. Plant, 60.

13. *Contracts in restraint of trade, when void.*—A contract prohibiting one of the parties from carrying on any specific trade or business, having no reasonable limitations as to time or place, is void. The prohibition which extends any further than will fully protect the party for whose benefit the contract is made, in his occupation or business, is an unreasonable restraint of trade, and will render the contract void. But a contract which does not prohibit the defendant from carrying on the business designated at any place he may choose, but only limits the manner of carrying it on, by fixing the prices at which he may buy and sell, and the persons to whom he may sell, is not a restriction of trade according to any proper construction of the rule.—Long v. Towl, 545.

14. *Contracts — Consideration — Dismissal of Suits.*—The dismissal of suits palpably unjust forms no adequate consideration for a promise.—*Id.*

15. *Contracts—Bonds—Measure of Damages—Penalties.*—Defendant agreed with plaintiffs not to pay for ore taken from plaintiffs' land or elsewhere more than plaintiffs were paying, and to sell all ore purchased by him to plaintiffs, for which he was to receive four dollars per thousand pounds more than plaintiffs were then paying to the miners on their own land; and bound himself in a certain sum, "as liquidated damages," to be paid in case of a violation of or failure to perform any of such stipulations. Such a sum was held to be a penalty. Where an agreement secures the performance or omission of various acts, which are not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely. (Basye v. Ambrose, 28 Mo. 39, cited and affirmed.)—*Id.*

See BILLS AND NOTES, 1. PARTNERSHIP, 1. CITY ORDINANCES, 1, 2. AGENCY, 1, 2.

CONVENTION.

See CONSTITUTION, 2.

CONVEYANCES.

1. *Fraudulent Conveyances—Assignments—Secret Preferences.*—In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general

CONVEYANCES—(*Continued.*)

scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction and be communicated to the other creditors and they do not object.—Sullivan's Adm'r v. Collier White Lead and Oil Company, 397.

2. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*—Such an agreement is against public policy—such an one as the law deems constructively fraudulent—and must therefore be held incapable of enforcement.—*Id.*

3. *Agents of Corporations — Simple Contracts — Agency.*—The conveyance of real property must purport to be made and executed by the corporation acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.—Musser v. Johnson, 74.

4. *Sheriff's Deed — Recitals.*—Where the plaintiff is bound to produce a judgment, the recitals in the deed under which he claims should conform to the judgment, in order that the court can see that the deed was made on the judgment.—Carpenter v. King, 219.

5. *Execution — What Estates Vendible — Mere Trusts in Equity not Vendible.* The statute (R. C. 1855, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.—McIlvaine v. Smith, 45.

6. *Equity — Debtor and Creditor — Creditor's Bills — Equitable Interest — Trusts.*—A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man cannot own property or money and not own it at the same time. He cannot be permitted to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction of such decree as may be rendered.—*Id.*

7. *Executions — Property exempt from — Marriage Settlements — Construction of Statute.*—The provisions of the act exempting additional property from execution (R. C. 1855, p. 754, § 1) do not affect the right of the husband to

CONVEYANCES—(*Continued.*)

receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.—Pauley v. Vogel, 291.

8. *Husband and Wife—Marriage Settlements—How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—*Id.*

9. *Husband and Wife—Voluntary Settlements—Creditors.*—As between the parties themselves, a voluntary settlement upon the wife may be upheld in equity. And where the husband is not indebted at the time of making it. such settlement cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view of being indebted at a future time, it will be void as against creditors prior and subsequent.—*Id.*

10. *Legislature—Powers—Tax Deeds.*—The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.—Abbott v. Lindenbower, 162.

11. *Tax Title—Ejectment—Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Sess. Acts 1863–4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—*Id.*

12. *Tax Deeds—Proceedings under against persons not owners, would have what effect.*—A deed conveying the title under proceedings against a person who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and give it to another. (Rev. Act, art. 2, §§ 10, 29; Adj. Sess. Acts 1863–4; Gen. Stat. 1865, p. 100, § 13, p. 104, § 39, cited and compared.)—*Id.*

13. *False assessmments void.*—An assessment in the name of a person who neither was nor ever had been the owner of the property, would be an utterly void assessment, and as against the owner of property cannot be made the foundation of a sale and conveyance of his land, even by legislative enactment.—*Id.*

14. *Ejectment—Evidence—Notice.*—In such a suit, evidence was admissible

CONVEYANCES—(*Continued.*)
to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him.—*Id.*

15. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax books, and collection of taxes, and return of delinquent tax lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*

16. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863-4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.—*Id.*

17. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust raised by implication to a certain proportion of the estate. When trust money is issued by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land, and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.—White v. Drew, 561.

18. *Partition—Trust Estates, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*Id.*

See FRADULENT CONVEYANCES; HUSBAND AND WIFE; LANDLORD AND TENANT; LEASE, MORTGAGES, AND DEEDS OF TRUST.

CORPORATIONS.

1. *Corporations—Railroad Companies—Eminent Domain, when granted.*—Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion.—Dietrich v. Murdock, 279.

CORPORATIONS—(*Continued.*)

2. *Corporations—Railroad Companies—Lands—Permission to occupy—Effect of.*—Whether the proceedings of the railroad corporation were sufficient to divest the title of the owner of the land upon which the road was located, or whether he thereby had any notice of an intention on the part of the company to take any portion of his land, is immaterial, if for a number of years after the initiatory steps taken for the location and construction of the road, there was no attempt on his part to prevent the execution of the work. In such case it must be assumed that the occupation of his land by the company for the purpose to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and, if compelled to leave the premises by proper proceedings, would permit such property to be removed.—*Id.*

3. *Railroad Companies—Consolidation.*—Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation.—Powell v. North Mo. R.R. Co., 63.

4. *Railroad Companies—Amalgamation.*—An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation.—*Id.*

5. *Corporation—Dissolution—Effects—Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosesoever hands they may come.—*Id.*

6. *Corporation—Transfer—Creditors.*—A corporation cannot give away the effects belonging to it, to the prejudice of creditors. A court of equity will follow the trust fund into the hands of other than *bona fide* creditors and purchasers.—*Id.*

7. *Agents of Corporations—Simple Contracts—Agency.*—The conveyance of real property must purport to be made and executed by the corporation, acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.—Musser v. Johnson, 74.

8. *Seal—Authority—Evidence.*—Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The affixing of the seal is not conclusive evidence of authority; but if dispute arise, the contrary must be shown by the objecting party.—*Id.*

9. *Corporations—Seal—Evidence.*—The common-law doctrine that corporations can do no act except by writing, duly attested by the corporate seal, appears to be greatly relaxed in England by the recent decisions, and in this country to be almost if not entirely repudiated. But the law still seems to be well settled that the common seal of a corporation is to be taken as the

CORPORATIONS—(*Continued.*)

only proper evidence of its act in all cases where a seal would be required if the instrument is to be executed by an individual.—Sandford v. Tremlett, 384.

10. *Lease — Assignment — Formalities required.* — It is not requisite that the assignment of a lease made by a corporation should possess the characteristics of a deed. Being a note in writing, signed by the agent of the corporation, authorized in the manner required by law, it is clearly within the terms of the act concerning frauds and perjuries, and must be considered competent evidence to show the transfer of the leasehold.—*Id.*

11. *Lease — Transfer — Individual — Corporation.* — An individual holding such a lease could transfer it without the formalities of a deed, and nothing more ought to be required of a corporation.—*Id.*

12. *Interest — License — Court of Criminal Correction, jurisdiction of.* — The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts 1865, p. 252) is repugnant to the general statute concerning interest (chap 89), and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93–96), and by virtue of § 2, chapter 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.— State v. Rashbaum, 501.

13. *Corporations — Citizenship.*—A corporation may be a citizen of a State, for the purpose of suing and being sued in the courts of the United States.— Herryford v. Ætna Insurance Company, 148.

14. *Corporations — Citizenship in other States.*—Although a corporation may act by agents beyond the bounds of the State which created it, and become, constructively, resident of this State under the statute, not only for the purpose of suing and being sued, but for the purposes of taxation in respect to property found here, yet it does not follow that the corporation must therefore cease to be a citizen of another State, within the act of Congress of Sept. 24, 1789.—*Id.*

15. *Foreign Insurance Agencies—Pleading—Waiver.*—Under the first section of the act concerning foreign insurance agencies (R. C. 1855, p. 885, § 1), a corporation has the same right to remove a suit brought against it, into the courts of the United States, that any other citizen of another State would have when sued in this State. Nor did it waive this right by answering and proceeding to trial after such removal had been refused. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction.— *Id.*

See DAMAGES, 1, 3. PRACTICE, CIVIL — PLEADINGS, 8, 9, 10. PRACTICE, CIVIL—PARTIES, 1, 2. RAILROADS, 1.

16. *Corporations — Capital Stock — Taxation.* — That portion of the capital stock of a corporation which has been invested in bonds of the United States is not subject to taxation by the State.—St. Louis Building and Savings Association v. Lightner, 421.

COURTS, COUNTY.

1. *County Courts — Repairs of County Buildings — Prohibitions.*—The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. (Gen. Stat. 1865, ch. 36, and ch. 137.) These matters belong to the administrative and ministerial functions of the County Court, and not to the judicial branch of their jurisdic-

COURTS, COUNTY—(*Continued.*)

tion. And for this reason it has been decided that even a prohibition will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. Even where a court of equity has jurisdiction to grant an injunction to restrain proceedings at law, it is never granted directly against a court, like a prohibition, but only against the persons who are parties to such proceedings, without impeaching the jurisdiction of the court itself.—Vitt v. Owens, 512.

2. *County Courts — Repairs of County Buildings — Mandamus — Injunction.*— Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.—*Id.*

3. *Railroads — County Court — Subscription — Election — Construction of Statute.*— The power given by section six of the act to incorporate the Platte City and Fort Des Moines Railroad Company (Adj. Sess. Acts 1859-60, p. 443), to the County Court of Platte county, to subscribe capital stock to said company, is, by section eight of the same act, made subject to the general railroad law. (R. C. 1855, p. 427, § 30.) And the true meaning and effect of this law is, that an election to ascertain the sense of the tax-payers as to such subscription is a necessary condition of the power to subscribe. A subscription made without such election was without authority of law, and void.— Leavenworth and Des Moines Railroad Company v. County Court of Platte County, 171.

4. *County Court — Appeals from — Jurisdiction of Circuit Court.* — Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.—*Id.*

5. *County Court, appeal from—Action of the inferior court must be affirmed or reversed.*— The failure to find any error in the proceedings on such an appeal is not proper ground for dismissing the appeal. The question presented by the record should be passed upon by the Circuit Court.—*Id.*

COURT OF CRIMINAL CORRECTION. See PRACTICE, CRIMINAL, 9; INTEREST, 1.

COURT, DISTRICT. See PRACTICE, CIVIL; APPEALS, 9.

COURT, PROBATE. See ADMINISTRATION, 3.

COURT, SUPREME. See PRACTICE; SUPREME COURT.

CRIMES AND PUNISHMENTS.

See CRIMINAL LAW. PRACTICE, CRIMINAL.

CRIMINAL LAW.

1. *Criminal Law — Assault — Words of provocation.*— Mere words, no matter how abusive they may be, cannot justify an assault.— Murray v. Boyne, 472.

2. *Criminal Law — Conspiracy — Evidence — Acts and Declaration of Co-conspirators.*— Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the acts of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.— *Id.*

3. *Criminal Law — Conspiracy — Evidence — Order of introduction of testimony.*— Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.— State v. Louisa Daubert, 239.

4. *Indictments — Sufficiency.*— In an action for perjury, for falsely taking a certain prescribed oath, where a part only of the oath was falsely taken, the indictment need not set out the whole, but may set out merely that portion of the oath taken which contained the falsehood.— State v. Neal, 119.

5. *Assault to Kill — Indictment — Averments — Construction of Statute.*— An indictment alleging that defendant, "feloniously, on purpose, and willfully," etc., "did then and there make an assault with the intent him, the said," etc., "then and there to kill," etc., but omitting to charge that the offense was committed "with malice aforethought," would be fatally defective under section 29, chapter 200, Gen. Stat. 1865, but is good and sufficient within the terms and meaning of section 32 of the same chapter. That the prosecutor used some of the terms embodied in section 29, such as "on purpose, and with a deadly weapon," is not to be regarded as absolutely conclusive that the indictment can be founded on that section only. These words may be treated as mere surplusage, and there will still remain a complete and sufficient description of an offense as designated in section 32.— State v. Seward, 203.

6. *Witnesses — Husband and Wife — Information.*— The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.— State v. Berlin, 572.

7. *Practice, Criminal — Indictment — Motion compelling to elect.*— The practice is now well settled that a motion to compel the prosecuting attorney to elect upon which count of an indictment he will proceed, is addressed to the sound discretion of the court trying the case, and the Supreme Court will not interfere with that discretion unless it is apparent that it has been exercised oppressively or to the manifest injury of the accused. Where the offense

CRIMINAL LAW—(*Continued.*)

charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and whenever there is a legal joinder. the court may exercise its discretion as to an election.—State v. Henry Daubert, 242.

8. *Practice, Criminal — Indictment — Nolle Prosequi.*— Where two defendants were jointly charged, in the same indictment, on two counts: 1, for larceny, and 2, for receiving stolen goods, it was error to permit the circuit attorney to enter a *nolle prosequi* against one defendant upon the first count, and against the other upon the second. The two remaining counts really constituted two indictments, requiring different kinds of proof, and separate and independent verdicts.— *Id.*

9. *Practice, Criminal — Indictment — Larceny — Evidence, what admissible*— Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.— *Id.*

10. *Practice, Criminal — Evidence — Verdict.*— If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.— *Id.*

D

DAMAGES.

1. *Street Railroads — Statute — Construction.* — The effect and intention of the act concerning street railroads, approved January 16, 1860, is that when the injury of the passenger is occasioned by his getting on or off the car at the forward platform, it shall be presumed as a matter of law that the negligence of the passenger himself contributed to produce the injury.—McKeon v. Citizens' R. R. Co., 80.

2. *Damages — Punitory — When Allowed.* — Vindictive and punitory damages can be given, if ever, in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done.—*Id.*

3. *Railroad Companies — Responsibility.* — Street railroad companies are not responsible for the crimes of an employee; nor liable for his acts of willful and malicious trespass. They are only answerable for his negligence, or incapacity, or unskillfulness, in the performance of the duties assigned to him.— *Id.*

4. *Damages — Punitory — Civil Actions.* — It is questionable whether damages for punishment can be given in any civil action.— *Id.*

5. *Damages — Appeal — Practice.*— Where plaintiff, having claimed treble damages, was allowed single damages only, and failed to appeal from the judgment of the court, but the case was carried to the District Court by defendant, it was error to reverse the decision below and award plaintiff treble damages.—Schmidt v. Densmore, 225.

6. *County Collector — Refusal to issue Certificate — Action for Damages.*— A party cannot maintain an action for damages against the clerk of a county court for issuing a certificate of election to the office of State and county col-

DAMAGES—(*Continued.*)

lector to another, and thereby depriving plaintiff of the emoluments of that office. The action for damages is predicated upon the idea that he is deprived of a legal and valid right. But plaintiff's proceeding is a virtual admission that the person to whom the certificate is issued is legally in possession of the office, and he cannot recover damages for being deprived of what does not belong to him. He cannot be permitted to disclaim his right to the office, and then have damages for being deprived of it.—State, to use of Bradshaw, v. Sherwood, 179.

7. *Contracts—Bonds—Measure of Damages—Penalties.*—Defendant agreed with plaintiffs not to pay for ore taken from plaintiffs' land or elsewhere more than plaintiffs were paying, and to sell all ore purchased by him to plaintiffs, for which he was to receive four dollars per thousand pounds more than plaintiffs were then paying to the miners on their own land; and bound himself in a certain sum "as liquidated damages," to be paid in case of a violation of or failure to perform any of such stipulations. Such a sum was held to be a penalty. Where an agreement secures the performance or omission of various acts, which are not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely. (Basye v. Ambrose, 28 Mo. 39, cited and affirmed.)—Long v. Towl, 545.

8. *Fraud and Deceit—When ground of Action for Damages.*—Where a person affirms either what he knows to be false, or what he does not know to be true, to the prejudice of another and for his own gain, he must answer in damages. But general fraudulent conduct, general dishonesty of purpose, or a mere general intention to deceive, amount to nothing unless they are connected with the particular transaction complained of and are shown to be the very ground on which the other party acted and on which the transaction took place, and he must have been actually deceived and defrauded by the representations made. Nor can damages be recovered for the breach of a mere gratuitous promise of favor, or for the consequence of undue confidence or want of prudence in affairs, or for oppressive conduct in foreclosing a mortgage under a power of sale, where the requirements of the contract have been pursued.—Rutherford v. Williams, 18.

9. *Equity—Grounds for Relief.*—To entitle a party to relief in equity, there must be some ground for specific relief beyond a mere claim for damages or for the payment of money.—*Id.*

See EQUITY, 7. ☞ SEE PARTICULARLY ADDENDA. ☜

DEEDS OF TRUST.

See CONVEYANCES; FRAUDULENT CONVEYANCES; MORTGAGES AND DEEDS OF TRUST.

DOWER.

1. *Partition—Trust Estate, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—White v. Drew, 561.

See HUSBAND AND WIFE.

E

EJECTMENT.

1. *Tax Title — Ejectment — Evidence.* — In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land. — Abbott v. Lindenbower, 163.

2. *Ejectment — Evidence — Notice.* — In such a suit, evidence was admissible to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him. — *Id.*

3. *Practice — Actions — Recovery of Real Property — What the proper action for.* — Where the principal object sought to be accomplished by the plaintiff is to recover possession of real estate, a proceeding in the nature of a bill in equity is not the proper remedy. An adequate remedy at law for that purpose has been provided in the action of ejectment. — Bobb v. Woodward, 482.

4. *Practice — Ejectment — Counter Claim — Specific Performance.* — Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father. — Harris v. Vinyard, 568.

ELECTIONS.

See CONSTITUTION, 2. REGISTRATION, 1.

EMINENT DOMAIN.

1. *Eminent Domain, not given by implication.* — The power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language. — Schmidt v. Densmore, 225.

2. *Corporations — Railroad Companies — Eminent Domain, when granted.* — Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion. — Dietrich v. Murdock, 279.

EQUITY.

1. *Equity — Grounds for Relief.*—To entitle a party to relief in equity, there must be some ground for specific relief beyond a mere claim for damages or for the payment of money.—Rutherford v. Williams, 19.

2. *Equity — Relief — How administered.*—Where there is any fraud touching property, courts of equity will interfere and administer a wholesome justice in favor of innocent persons who are sufferers by the fraud, without fault on their side, by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien.—*Id.*

3. *Courts of Equity—Equities of Redemption.*—Courts of equity will require that the power of disposing of equities of redemption shall be exercised in all fairness and integrity.—*Id.*

4. *Fraudulent Sales — Proceeds.*—Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity as a substitution for the original property, and be subjected to the same trust.—*Id.*

5. *Usurious Contracts — Equity.*—Even where the statute makes an usurious contract void, equity will aid the borrower only upon condition of his paying what is *bona fide* and really due. (Ransom v. Hays, 39 Mo. 445, cited and affirmed.)—*Id.*

6. *Courts of Equity — Relief — When granted.* — Relief by a court of equity is confined to instances of fraud and misrepresentation by one party, touching some matter of interest, contract, security, mortgage, or conveyance, or property of some kind, in respect of which the other party is going to deal on the faith of representations made as to the truth of facts, whereby he is induced to act and deal not only to his own injury and loss, but to the gain of the party who makes the false representation or practices the fraud and deceit. In these cases relief is administered in general for the purpose of annulling the contract, conveyance, or instrument, and subjecting the property so acquired to the purpose of making such representations good; sometimes even to compel the party to make up any deficiency in money, by way of compensation or damages, when the property itself proves insufficient or cannot be reached.—*Id.*

7. *Damages — Jury — Master in Chancery.*— Mere damages for an injury or a breach of contract must be assessed by a jury at law; but a compensation for beneficial and lasting improvements or profits made may be safely ascertained before a master, or upon an issue directed, at discretion. The case must be one admitting of definite compensation, to be estimated in damages.

8. *Equity — Decree — Account.*— Where there is an equity for relief and an account may properly be taken, though the court cannot decree the plaintiff a recompense in damages for his loss, it may substitute an account of the defendant's profits.— *Id.* 20.

9. *Equity — Debtor and Creditor — Creditor's Bills — Equitable Interest — Trusts.* — A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man cannot own property or money and not own it at the same time. He cannot be permitted

EQUITY—(*Continued.*)

to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction of such decree as may be rendered.—McIlvaine v. Smith, 45.

10. *Equity — Statutory Powers.*— Where an equitable defense to an action amounted to nothing more than the showing of an incomplete or imperfect execution of a statutory power, there was no ground for the interference of a court of equity.—Hubble v. Vaughan, 138.

11. *Equity — Purchaser — Fraud — Relief.*— It is a well-settled principle of equity law that where one becomes a purchaser, under such circumstances as would make it a fraud to permit him to hold on to his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtain it at a sacrifice, the court will relieve against such frauds; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby.—McNew v. Booth, 189.

12. *Equity — Payment — Reasonable Time.*— Where, in case of property sold under a deed of trust, the debtor party is promised a reconveyance thereof upon payment of the money owing under the deed within a reasonable time, special circumstances, the situation of the parties, and the character of the property, must be taken into account in affixing the standard. Where a person became possessed of property in such a way that the law would have held him a trustee, the lapse of time would make no difference.—*Id.*

13. *Husband and Wife—Marriage Settlements — How affected by debts of Husband, at law and in equity.*— The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—Pawley v. Vogel, 291.

14. *Husband and Wife — Wife's Trust Estate — What Proceedings to protect against Husband's Creditors.*— If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.— *Id.*

EQUITY—(*Continued.*)

15. *Corporation — Dissolution — Effects — Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosesoever hands they may come.—Powell v. North Missouri R.R. Co., 63.

16. *Contract—Equity—Specific Performance.*—If a contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree a specific performance as it is to give damages at law.—Hardy v. Matthews, 406.

17. *Practice — Trial — Appeal — Review of Evidence — Causes at Law and in Equity distinguished.*—In common law proceedings, as to questions of fact which are properly triable before a jury or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.—King v. Moon, 551.

18. *Fraud—Presumptions in Law and Equity.*—Fraud may be presumed in equity, but must be proved at law. Therefore, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict.—*Id.*

19. *Partnership — What issues triable by the Court.*—Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.—Hunter v. Whitehead, 524.

ESTOPPEL.

1. *Landlord and Tenant — Lease — Occupation under — Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.—Grant v. White, 285.

See INSURANCE, 11, 12.

EVIDENCE.

1. *Evidence — Admissibility — Sufficiency — Competency.*—Where the objections offered to the admissibility of a paper in evidence go, not to the competency, but merely to the sufficiency of the statements therein made, the court committed no error in permitting it to be read.—Deitrich v. Murdock, 279.

2. *Fraud — Evidence.*—In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.—Hubble v. Vaughan, 133.

3. *Witnesses—Deed of Trust—Testimony of Maker—Incompetency of, under Statute.*—Under the second subdivision of section six of the act concerning witnesses (R. C. 1855, p. 1578), testimony of the maker of a deed of trust, tending to show that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out, or that a large portion of it was the amount of

EVIDENCE—(*Continued.*)

an order for goods never delivered to him, and that, by the advice and direction of the parties for whose benefit the deeds were executed, this sum was falsely stated for the purpose of deterring his other creditors from proceeding against his property, was incompetent.—Byrne v. Becker, 264.

4. *Confirmation, Certificate of — Admissibility of Parol Evidence to correct errors in.*—Suit in ejectment was brought by the representatives of Joseph Lacroix to obtain the title to certain property adjoining St. Louis. The proof embraced a certificate of confirmation, under the act of Congress passed May 26, 1824, which named "Louis Lacroix" as the person entitled to the property in dispute. If the case had proceeded upon the theory that Joseph Lacroix and Louis Lacroix were two distinct individuals actually living in St. Louis at the date of the certificate, parol evidence would be inadmissible to show that the instrument was intended for a different person than the one therein named, thereby taking the title from Louis Lacroix, in which it had been vested, and transferring it to one in whom it had not been vested. But parol evidence, by all the authorities, was admissible to show that Louis Lacroix resided in a different city, and died long before the claim to the property was proved, and that the person under whom the adverse party claimed was an impostor. And where the proof ascertained that there was no other person within the class to whom the certificate might have been given but Joseph Lacroix, parol evidence was admissible to prove his identity with the person described in the instrument as "Louis Lacroix," and a mistaken insertion by the recorder of the name of "Louis" instead of "Joseph."—Williams v. Carpenter, 327.

5. *Confirmation, Certificate of — Nature and weight of, as Evidence.* — A certificate of confirmation under the act of 1824 does not convey title, but is merely *prima facie* evidence of the existence of certain facts at a former date, and may be rebutted or disproved by other competent evidence. It is in the nature of a deposition, and the testimony of witnesses or a deposition would be admissible to correct its errors.—*Id.*

6. *Evidence — Original Deed of Trust and certified copy — Variance.*— Where notice of the sale of real estate under a deed of trust was published in a locality required by the deed, and all parties concerned in the sale had actual notice thereof, the publication was sufficient, although the certified copy of the record of the deed from the recorder's office made it appear that notice was to be published elsewhere; and the parties to the instrument must be held bound by its true reading.—Jones v. Moore, 413.

7. *Actions — Malicious Prosecutions — Declarations.*—In actions for malicious prosecution, declarations of the defendant to show that he was not actuated by malice in commencing the prosecution are inadmissible.—Moore v. Sauborin, 490.

8. *Sheriff's Deed — Recitals — What, prima facie Evidence.*—A sheriff's deed which recites the date of the rendition of the judgment, the amount for which it was rendered, the names of the parties to the record, the time of filing the transcript, and the time when execution was issued, is sufficiently definite to render it *prima facie* evidence and shift the burden of proof upon the adverse party, if he denies its validity, even if it does not recite the name of the justice of the peace before whom it was rendered. Such recitals contained every material fact required by the statute relating to executions.—Carpenter v. King, 219.

EVIDENCE—(*Continued.*)

9. *Sheriff's Deed, presumptive evidence of its recitals — Burden of Proof.*— The sheriff's deed is presumptive evidence of the recitals contained in it, without any accompanying proofs; subject, however, to be destroyed or invalidated when attacked by a party resisting it. (McCormick v. Fitzmorris *et al.*, 39 Mo. 24, affirmed.) — *Id.*

10. *Legislature — Powers — Tax Deeds.*— The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.—Abbott v. Lindenbower, 162.

11. *Tax Deeds, conclusive evidence of what.*— The assessment of land, and the delivery of tax books, and collection of taxes, and return of delinquent tax lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.— *Id.*

12. *Ejectment — Evidence — Notice.*— In such a suit, evidence was admissible to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him.— *Id.*

13. *Written Instrument — Ambiguity — Parol Evidence.*— Where the matter is uncertain, on the face of the instrument, whether it was intended to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation.— Musser v. Johnson, 74.

14. *Seal — Authority — Evidence.* — Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The affixing of the seal is not conclusive evidence of authority; but if dispute arise, the contrary must be shown by the objecting party.—*Id.*

15. *Act of Congress of* 1812 — *Commons Title — Recorder Hunt's Certified List — Proof of inhabitation, cultivation, etc., prior to* 1803.— A commons title under act of Congress of June 13, 1812, with an approved survey, is equivalent to a patent, and must prevail, unless the claimant can prove the facts necessary to show that no title passed; and this may be done by actual proof that claimant had inhabited, cultivated, or possessed a lot, within the meaning of that act, prior to December 20, 1803, situated within the boundaries of the survey of the commons. But documentary evidence, consisting of Recorder Hunt's certified list of lots confirmed under the acts of June 13, 1812, and May 26, 1824, a U. S. survey and field notes showing the lot sued for, and a certificate of confirmation issued by the United States recorder of land titles, taken alone, are only *prima facie* evidence of title, and not sufficient to surmount the commons title under the act of 1812. (Vasquez v. Ewing, 24 Mo. 31, affirmed.) And it is not enough merely to prove inhabita-

EVIDENCE—(*Continued.*)

tion, cultivation, or possession, somewhere on the land claimed. There must also be evidence of the location and boundaries of the lot.—Vasquez v. Ewing, 247.

16. *Out-lot—How shown by evidence of facts in pais.*—When an out-lot is to be proved by evidence of facts *in pais*, it must be shown to have existed in the character of an out-lot prior to December 20, 1803, with designated and ascertainable location and boundaries; though actual occupancy or cultivation may not be essential to establish its existence.—*Id.*

17. *Criminal Law—Conspiracy—Evidence—Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the act of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.—State v. Louisa Daubert, 239.

18. *Criminal Law—Conspiracy—Evidence—Order of introduction of testimony.*—Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.—*Id.*

19. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible.*—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.—State v. Henry Daubert, 242.

20. *Practice, Criminal—Evidence—Verdict.*—If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.—*Id.*

21. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 587, § 5), it must appear that she conducted the business or transaction about which she was testifying.—Hardy v. Matthews, 406.

22. *Fire Insurance Policy—Evidence.*—Where no written application is required as a condition for the issuing of a policy of fire insurance, and the policy contained a condition that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy would be void," and it appeared that at the date of the policy the plaintiff, assured, owned only an individual half-interest in the property insured, and that there were encumbrances upon it, neither of which facts was expressed in said policy: *Held*, that it was competent for the assured, in case

EVIDENCE—(*Continued.*)

of loss, to prove that, before the policy was delivered or the premium paid, the plaintiff informed the agent of the company of the condition of the title and encumbrances.—Franklin v. Atlantic Ins. Co., 456.

23. *Insurance Policy—Estoppels.—Held*, also, that where the agent of a foreign insurance company, whose policies contained the above-mentioned conditions, before issuing the policy or receiving the premium, being duly notified by the assured that his interest in the property was not entire, unconditional, and sole, and that there were encumbrances upon the property, failed to duly express these facts in a policy prepared by himself, and delivered it to the assured, saying that "it made no difference; it was all right," or words to that effect, and received the premium, the act of the agent was such a waiver of the conditions named as would amount to an estoppel *in pais.—Id.*

24. *Corporations — Seal — Evidence.*—The common-law doctrine that corporations can do no act except by writing, duly attested by the corporate seal, appears to be greatly relaxed in England by the recent decisions, and in this country to be almost if not entirely repudiated. But the law still seems to be well settled that the common seal of a corporation is to be taken as the only proper evidence of its act in all cases where a seal would be required if the instrument is to be executed by an individual.—Sandford v. Tremlett, 384.

25. *Practice — Trial — Appeal — Review of Evidence — Causes at Law and in Equity distinguished.*— In common-law proceedings, as to questions of fact which are properly triable before a jury, or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact. —King v. Moon, 551.

26. *Fraud — Presumptions in Law and Equity.*— Fraud may be presumed in equity, but must be proved at law. Therefore courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict.—*Id.*

27. *Fraud—Real Property—Sale of—Possession not changed after—Fact of, how far proof of fraud.*— The fact that after sale of real estate possession was never taken, nor were acts of ownership ever exercised over the property by the vendee, would not, under the present system of registration, be conclusive evidence of fraud, but in connection with other circumstances indicating fraudulent intent is entitled to some weight.—*Id.*

EXECUTIONS.

1. *Executions — Property exempt from — Marriage Settlements —Construction of Statute.*— The provisions of the act exempting additional property from execution (R. C. 1855, p. 754, § 1) do not affect the right of the husband to receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.—Pauley v. Vogel, 291.

2. *Execution — What Estates Vendible — Mere Trusts in Equity not Vendible.* The statute (R. C. 1855, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that

EXECUTIONS—(*Continued.*)

it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.—McIlvaine v. Smith, 45.

3. *Executions — Notice.*— The provision of the statute (Gen. Stat. 1865, ch. 160, §§ 43, 44) which requires notice to be given to a defendant where an execution is issued to a county other than that in which he resides, has been uniformly held to apply only to cases where the execution is sent to be levied on land situate in a county different from that in which the judgment was rendered and the execution issued.— Harper v. Hopper, 124.

4. *Justice's Court — Judgment — Transcript — Execution — Construction of Statute.*— The provision of section 6, ch. 90, p. 951, R. C. 1855—section 6, ch. 182, p. 712, Gen. Stat. 1865 — which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court after three years had elapsed, without having the same revived, referred exclusively to the issuing of executions by the justice of the peace, and had no application to proceedings on a transcript. The plain import and intention of section 17, ch. 90, p. 961, R. C. 1855 — section 14, ch. 183, p. 717, Gen. Stat. 1865 — is, that the lien should attach from the time the transcript is filed, for the same length of time and with like effect as upon a judgment, from the date of its rendition.— Carpenter v. King, 219.

F

FRAUDS AND PERJURIES.

1. *Fraud and Deceit — When ground of Action for Damages.*—Where a person affirms either what he knows to be false, or what he does not know to be true, to the prejudice of another and for his own gain, he must answer in damages. But general fraudulent conduct, general dishonesty of purpose, or a mere general intention to deceive, amount to nothing unless they are connected with the particular transaction complained of and are shown to be the very ground on which the other party acted and on which the transaction took place, and he must have been actually deceived and defrauded by the representations made. Nor can damages be recovered for the breach of a mere gratuitous promise of favor, or for the consequence of undue confidence or want of prudence in affairs, or for oppressive conduct in foreclosing a mortgage under a power of sale, where the requirements of the contract have been pursued. And the damage resulting from the fraud or misconduct must be the direct and immediate consequence of the wrongful act.—Rutherford v. Williams, 18.

2. *Frauds — Resulting Trusts.*— A party who has acquired property or gained an advantage by means of his fraudulent acts should be declared a trustee for the benefit of him who is injured by such fraud.—*Id.*, 19.

3. *Fraud—Presumptions in Law and Equity.*—Fraud may be presumed in equity, but must be proved at law. Therefore, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict. — King v. Moon, 551.

FRAUDS AND PERJURIES—(*Continued.*)

4. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.*— Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for one thousand dollars, and in pursuance of this arrangement the property was conveyed to defendants: *held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker, notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.— Kratz v. Stocke, 351.

5. *Contracts, executed and executory.*— Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.—*Id.*

See FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

1. *Attachment — Deed of Trust — Intent of Maker to hinder and delay not participated in by Beneficiaries.*—An intent on the part of the maker of a deed of trust, in the execution of the instrument, to hinder, delay, or defraud his creditors, unless such intent was participated in by the beneficiaries in the deed, does not render it fraudulent and void.—Byrne v. Becker, 264.

2. *Fraudulent Conveyances — Assignments — Secret Preferences.*— In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction, and be communicated to the other creditors and they do not object.— Sullivan's Adm'r v. Collier White Lead and Oil Company, 397.

3. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*— Such an agreement is against public policy, such an one as the law deems constructively fraudulent, and must therefore be held incapable of enforcement.— *Id.*

4. *Fraudulent Conveyances, statute concerning — Sale — Change of possession, what constitutes.*— The tenth section of the act concerning fraudulent conveyances (Gen. Stat. 1865, p. 440) necessarily implies that, as against the vendor, the possession must be exclusively in the vendee. There must be a complete change of the dominion and control over the property sold, and some

FRAUDULENT CONVEYANCES—(*Continued.*)

act which will operate as a divestiture of title and possession from the vendor, and a transference into the vendee. This necessarily excludes the idea of a joint or concurrent possession. It may not be essential or indispensable that the goods should be moved into a new or different house, but there must be some open, notorious, or visible act, clearly and unequivocally indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place; and, under the statute, the change must not be merely formal and temporary. But where the whole law has been complied with, there is nothing to prevent the employment of the vendor to render services in and about the property in the same manner as any other agent or employee.—Claflin v. Rosenberg, 439.

5. *Fraud—Evidence.*—In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.—Hubble v. Vaughan, 138.

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See FRAUDS AND PERJURIES.

G

GARNISHMENT.

See ATTACHMENT.

H

HUSBAND AND WIFE.

1. *Husband and Wife—Marriage Settlements—How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like

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4. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.*— Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for one thousand dollars, and in pursuance of this arrangement the property was conveyed to defendants: *held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker, notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.— Kratz v. Stocke, 351.

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FRAUDULENT CONVEYANCES.

1. *Attachment — Deed of Trust — Intent of Maker to hinder and delay not participated in by Beneficiaries.*—An intent on the part of the maker of a deed of trust, in the execution of the instrument, to hinder, delay, or defraud his creditors, unless such intent was participated in by the beneficiaries in the deed, does not render it fraudulent and void.—Byrne v. Becker, 264.

2. *Fraudulent Conveyances — Assignments — Secret Preferences.*— In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction, and be communicated to the other creditors and they do not object.— Sullivan's Adm'r v. Collier White Lead and Oil Company, 397.

3. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*— Such an agreement is against public policy, such an one as the law deems constructively fraudulent, and must therefore be held incapable of enforcement.— *Id.*

4. *Fraudulent Conveyances, statute concerning — Sale — Change of possession, what constitutes.*— The tenth section of the act concerning fraudulent conveyances (Gen. Stat. 1865, p. 440) necessarily implies that, as against the vendor, the possession must be exclusively in the vendee. There must be a complete change of the dominion and control over the property sold, and some

FRAUDULENT CONVEYANCES—(*Continued.*)

act which will operate as a divestiture of title and possession from the vendor, and a transference into the vendee. This necessarily excludes the idea of a joint or concurrent possession. It may not be essential or indispensable that the goods should be moved into a new or different house, but there must be some open, notorious, or visible act, clearly and unequivocally indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place; and, under the statute, the change must not be merely formal and temporary. But where the whole law has been complied with, there is nothing to prevent the employment of the vendor to render services in and about the property in the same manner as any other agent or employee.— Claflin v. Rosenberg, 439.

5. *Fraud — Evidence.*— In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.— Hubble v. Vaughan, 138.

6. *Fraudulent Sales — Proceeds.*— Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity as a substitution for the original property, and be subjected to the same trust.— Rutherford v. Williams, 19.

7. *Fraud — Real Property — Sale of — Possession not changed after — Fact of, how far proof of Fraud.*—The fact that after sale of real estate possession was never taken, nor were acts of ownership ever exercised over the property by the vendee, would not, under the present system of registration, be conclusive evidence of fraud, but in connection with other circumstances indicating fraudulent intent is entitled to some weight.— King v. Moon, 551.

See FRAUDS AND PERJURIES.

G

GARNISHMENT.

See ATTACHMENT.

H

HUSBAND AND WIFE.

1. *Husband and Wife—Marriage Settlements — How affected by debts of Husband, at law and in equity.*— The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like

HUSBAND AND WIFE—(*Continued.*)

that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—Pawley v. Vogel, 291.

2. *Husband and Wife—Voluntary Settlements—Creditors.*—As between the parties themselves, a voluntary settlement upon the wife may be upheld in equity. And where the husband is not indebted at the time of making it, such settlement cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view of being indebted at a future time, it will be void as against creditors prior and subsequent.—*Id.*, 292.

3. *Practice—Replevin—Trusts not recognized by action of.*—In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or of the equities of the wife.—*Id.*

4. *Husband and Wife—Wife's Trust Estate—What Proceedings to protect against Husband's Creditors.*—If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.—*Id.*

5. *Married Women—Separate Real Estate—Agents—Contract made by—Liability of Third Persons to Principal for.*—Although land belongs to a *femme covert* in her sole individual right, it is undoubtedly true that her husband is seized with her in the possession, and she must be held to be acting as his agent. But a man may delegate an agency to his wife, as well as to any other person; or he may ratify her acts as agent, although done without previous authorization. And an agent may make a contract in his own name, whether he describes himself as an agent or not, and his principal will be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit was given to the agent and it was intended by both parties that no resort should in any event be had by or against the principal upon it.—Grant v. White, 286.

6. *Husband and Wife—Joinder of Parties—Ante-Nuptial Settlements—Debts of Wife contracted prior to Marriage—Liability of Husband for.*—The right of a creditor to a judgment against both husband and wife for the debt of the latter cannot be destroyed by virtue of a contract between them that each should have the exclusive ownership and control of their own property, and that the separate property of each should be exempted from liability for the debts of the other contracted previous to the marriage.—Obermeyer v. Greenleaf, 304.

7. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 587, § 5), it must appear that she conducted the business or transaction about which she was testifying.—Hardy v. Matthews, 406.

8. *Executions—Property exempt from—Marriage Settlements—Construction of Statute.*—The provisions of the act exempting additional property from execution (R. C. 1855, p. 754, § 1) do not affect the right of the husband to receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.—Pawley v. Vogel, 291.

HUSBAND AND WIFE—(*Continued.*)

9. *Witnesses — Husband and Wife — Information.*— The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.— State v. Berlin, 572.

10. *Partition — Trust Estates, Dower in.*— The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.— White v. Drew, 561.

I

INDICTMENT.

See CRIMINAL LAW. HUSBAND AND WIFE. PRACTICE, CRIMINAL. WITNESSES.

INJUNCTION.

See Quinlivan v. English, 362. MANDAMUS, 2.

INSTRUCTIONS.

See PRACTICE, CIVIL — CRIMINAL. SUPREME COURT. EVIDENCE. WITNESSES.

INSURANCE.

1. *Insurance — Application — Contract.*— Where an application for insurance was filed, and on the same day the company proceeded to make out and sign the policy, it ratified the application and its assent was complete. The acceptance of the proposal to insure for the premium offered is the completion of the negotiation.— Keim v. Home Mutual Insurance Company, 38.

2. *Insurance — Agreement — Notice of Fire.*— When the company accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the day when the application was filed and the policy made out and signed, and the insured was under no legal or moral obligation to notify the company that the building insured had been burned in the meantime.—*Id.*

3. *Insurance — Voluntary Contract — Suit brought, when.*—The contract of insurance is a voluntary contract, and the insurers have the same right to incorporate and impose the condition that all claims should be forfeited under it unless suit were brought to the next term of court, held sixty days or more after refusal of the company to pay, as they have to impose any other condition. If the insured objects to it, he is under no obligation to conclude the contract; but if he will voluntarily enter into it, he will be held bound thereby.—*Id.*

4. *Insurance — Suit, on what Contract.*— The suit can only be brought on the contract as contained in the policy.—*Id.*

5. *Policies of Insurance, when void in part; when in toto.*—The doctrine "void in part, void *in toto*" has no application to instruments or contracts which contain some forbidden vice or void parts, if the good be mixed with the bad, provided the separation can be made. The exceptions are, where a statute, by its express terms, declares the whole instrument or contract void on account of some provision which is unlawful; or where there is some all-pervading

INSURANCE—(*Continued.*)

vice, such as fraud, or some unlawful act which is condemned by public policy or the common law, and avoids all parts of the transaction because all are alike infected.— Koontz v. Hannibal Savings and Insurance Company, 126.

6. *Policies of Insurance — False Warranty.*— Where a policy of insurance upon a certain livery stable was made to cover both the personal and real estate, and the application of the assured contained a false warranty touching encumbrances upon the real estate; and where it further appeared that the personal property was separately valued and appraised, and nothing showed that the representation as to the encumbrances upon the stable formed any inducement to the execution of the policy covering the personal property: *held*, that the assured might recover the value of the latter, although the policy was rendered void as to the real estate by reason of such false warranty.—*Id.*

7. *Insurance Policies—Causes of Exclusion—Construction.*—A policy of insurance contained the following clause: "Provided, always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or of any loss by theft at or after the fire:" *held*, that the clause of exclusion was intended to cover acts of spoliation or burning committed by an army of invasion or rebellion, even when performed without any direct commands from the superior officers. The real question to be settled in determining the meaning of the clause is, did the fire happen, or the loss occur, by reason of, or in consequence of, the military and usurped power of the rebels, and were they the proximate cause of the burning and destruction of property?— Barton v. Home Insurance Company, 156.

8. *Fire Insurance Policy — Variation, effect of.*— The charter of a mutual fire insurance company contained a provision that "if property insured by said company shall be alienated by sale or otherwise, the policy issued thereon shall be void, and shall be surrendered to said company to be canceled." Property so insured was sold, and the holder of the policy agreed with the secretary of the company that said policy should be so altered as to cover other property of the assured, differently situated; and this agreement was indorsed on the policy and signed by the secretary. *It seems* that such provision avoided the policy utterly, not only as to the property originally insured, but as to that so agreed to be substituted in its place.— Mound City Insurance Company v. Curran, 374.

9. *Fire Insurance Policy— Premium Note, consideration of—Power of insured to recover loss upon Policy.*— Such a policy is utterly void independently of this provision, for neither the insured nor the alienee of the insured could have recovered a loss upon it. After the alienation the consideration of the note would fail, and the note itself would become void also.—*Id.*

10. *Fire Insurance — Written Application — Authority of Secretary alone to make Contract of Insurance.*—Where the charter and by-laws of an insurance company provided that policies should be issued only upon a written application, making representation of all material circumstances affecting the risk, and should be signed by the president and secretary, such indorsement of the secretary was void. He had no authority to make a policy or contract of insurance otherwise than in the manner prescribed in the charter and by-laws. Even though the president had signed the original policy, and the same instru-

INSURANCE—(*Continued.*)

ment was again issued by the secretary as a blank newly filled up upon verbal application, this would have been equally without authority and a fraud upon the company.—*Id.*

11. *Fire Insurance Policy — Evidence.* — Where no written application is required as a condition for the issuing of a policy of fire insurance, and the policy contained a condition that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy would be void," and it appeared that at the date of the policy the plaintiff, assured, owned only an individed half-interest in the property insured, and that there were encumbrances upon it, neither of which facts was expressed in said policy: *held*, that it was competent for the assured, in case of loss, to prove that, before the policy was delivered or the premium paid, the plaintiff informed the agent of the company of the condition of the title and encumbrances.—Franklin v. Atlantic Ins. Co., 456.

12. *Insurance Policy—Estoppels.—Held*, also, that where the agent of a foreign insurance company, whose policies contained the above-mentioned conditions, before issuing the policy or receiving the premium, being duly notified by the assured that his interest in the property was not entire, unconditional, and sole, and that there were encumbrances upon the property, failed to duly express these facts in a policy prepared by himself and delivered it to the assured, saying that "it made no difference; it was all right," or words to that effect, and received the premium, the act of the agent was such a waiver of the conditions named as would amount to an estoppel *in pais.—Id.*

13. *Foreign Insurance Companies—Agents.*—Foreign insurance companies are bound by the acts of their local agents, acting within the scope of their general authority, without any immediate knowledge of the transaction on the part of the company.—*Id.*

INTEREST.

1. *Interest — License — Court of Criminal Correction, jurisdiction of.*—The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts 1865, p. 252) is repugnant to the general statute concerning interest (chap 89), and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93–96), and by virtue of § 2, chapter 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.—State v. Rashbaum, 501.

2. *Usurious Contracts — Equity.*—Even where the statute makes an usurious contract void, equity will aid the borrower only upon condition of his paying what is *bona fide* and really due. (Ransom v. Hays, 39 Mo. 445, cited and affirmed.)—Rutherford v. Williams, 18.

J

JUDGMENT.

See EXECUTIONS, 4. JUSTICE'S COURT, 1. PRACTICE, CIVIL. APPEAL. TRIAL, 9, 10, 19—CRIMINAL, 11.

JURISDICTION.

1. *County Court — Appeals from — Jurisdiction of Circuit Court.* — Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.— County of St. Louis v. Lind, 348.
2. *Practice — Circuit Court — Jurisdiction of, when inquired into.* — The question whether the Circuit Court has jurisdiction of the cause may always be inquired into.—Hannibal & St. Joseph R.R. Co. v. Mahoney, 467.
3. *Interest — License — Court of Criminal Correction, jurisdiction of.* — The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts, 1865, p. 252) is repugnant to the general statute concerning interest (chapter 89) and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93–6), and by virtue of § 2, chap. 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.— State v. Rashbaum, 501.

See JUSTICES' COURTS, 3. PRACTICE, CIVIL. ACTIONS, 3.

JURY.

See PRACTICE, CIVIL. TRIALS.

JUSTICES' COURTS.

1. *Justice's Court — Judgment — Transcript — Execution — Construction of Statute.* — The provision of section 6, chap. 90, p. 951, R. C. 1855 — section 6, chap. 182, p. 712, Gen. Stat. 1865 — which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court after three years had elapsed, without having the same revived, referred exclusively to the issuing of executions by the justice of the peace, and had no application to proceedings on a transcript. The plain import and intention of section 17, chap. 90, p. 961, R. C. 1855—section 14, chap. 183, p. 717, Gen. Stat. 1865 — is, that the lien should attach from the time the transcript is filed, for the same length of time and with like effect as upon a judgment, from the date of its rendition.— Carpenter v. King, 219.
2. *Justice's Court — Trial — Consolidation of Suits.* — The action of a justice of the peace in consolidating different suits is improper if thereby the amount in controversy will be increased beyond the jurisdiction of the justice, even where they are brought by plaintiff against the same defendant, and are based upon causes of action which, under the statute, may be joined and determined in the same suit.— Bridle v. Grau, 359.
3. *Justice's Court — Jurisdiction.* — But where judgment is rendered for an amount within the jurisdiction of the justice, without exception on the part of plaintiff, it will be permitted to stand for that amount, notwithstanding such order of consolidation.—*Id.*
4. *Justice's Court — Appeal — Amount of Judgment.* — Upon appeal trial in the Circuit Court, judgment for a larger sum than that within the jurisdiction of the Justice's Court is erroneous.—*Id.*

L

LAND TITLES.

1. *Statute — Quieting Titles — Construction.*— In order to institute proceedings under the statute touching suits for quieting titles (Gen. Stat. 1865, p. 662, § 53), the petitioner must be in actual possession of the premises; the object of the petition being, not for the purpose of settling the title in the first instance, but only preliminary to an action which the defendant or adverse claimant may be ordered to bring for that purpose. — Rutherford v. Ullman, 216.

2. *Act of Congress of* 1812 — *Commons Title — Recorder Hunt's Certified List — Proof of inhabitation, cultivation, etc., prior to* 1803.— A commons title under act of Congress of June 13, 1812, with an approved survey, is equivalent to a patent, and must prevail, unless the claimant can prove the facts necessary to show that no title passed; and this may be done by actual proof that claimant had inhabited, cultivated, or possessed a lot, within the meaning of that act, prior to December 20, 1803, situated within the boundaries of the survey of the commons. But documentary evidence, consisting of Recorder Hunt's certified list of lots confirmed under the acts of June 13, 1812, and May 26, 1824, a U. S. survey and field-notes showing the lot sued for, and a certificate of confirmation issued by the United States recorder of land titles, taken alone, are only *prima facie* evidence of title, and not sufficient to surmount the commons title under the act of 1812. (Vasquez v. Ewing, 24 Mo. 31, affirmed.) And it is not enough merely to prove inhabitation, cultivation, or possession, somewhere on the land claimed. There must also be evidence of the location and boundaries of the lot. — Vasquez v. Ewing, 247.

3. *Out-lot — Existence of facts necessary to constitute, how determined.*— The existence of facts necessary to constitute an "out-lot" is a question of law for the court.—*Id.*

4. *Out-lot — Location and Boundaries prior to* 1803.— To constitute such a lot, it must be shown to have had an existence as such under the former government, prior to the 20th of December, 1803, with a definite location and boundaries.—*Id.*

5. *Out-lot—Surveyor-General—Power of, to assign location to.*—The Surveyor-General had no authority by law to assign a location to such out-lots, but authority only to survey them by their definite location and boundaries as they had actually existed prior to 1803, or as the same had been proved before the recorder; nor had his superior officers of the land office any authority by law to create, by instructions, a definite location and boundaries for such lots, where none existed before.—*Id.*

6. *Out-lot — How shown by evidence of facts in pais.*—When an out-lot is to be proved by evidence of facts *in pais*, it must be shown to have existed in the character of an out-lot prior to December 20, 1803, with designated and ascertainable location and boundaries; though actual occupancy or cultivation may not be essential to establish its existence.— *Id.*

7. *Concession under Spanish Government — Abandonment — Re-annexation.*— Where, under the former government, a written concession, by the Lieutenant Governor, of certain land was given upon a condition set forth in the conces-

LAND TITLES—(*Continued.*)

sion, and on the margin of the record of the same was a subsequent entry declaring that the lot remained incorporated in the royal domain on account of the owner having abandoned it, such entry must be competent to show that the practice of abandonment and re-annexation prevailed at that time, and, *a fortiori*, it must be competent to show a re-annexation of the very land conceded.—*Id.*

8. *Confirmation, Certificate of — Admissibility of Parol Evidence to correct errors in.*—Suit in ejectment was brought by the representatives of Joseph Lacroix to obtain the title to certain property adjoining St. Louis. The proof embraced a certificate of confirmation, under the act of Congress passed May 26, 1824, which named "Louis Lacroix" as the person entitled to the property in dispute. If the case had proceeded upon the theory that Joseph Lacroix and Louis Lacroix were two distinct individuals actually living in St. Louis at the date of the certificate, parol evidence would be inadmissible to show that the instrument was intended for a different person than the one therein named, thereby taking the title from Louis Lacroix, in whom it had been vested, and transferring it to one in whom it had not been vested. But parol evidence, by all the authorities, was admissible to show that Louis Lacroix resided in a different city, and died long before the claim to the property was proved, and that the person under whom the adverse party claimed was an imposter. And where the proof ascertained that there was no other person within the class to whom the certificate might have been given but Joseph Lacroix, parol evidence was admissible to prove his identity with the person described in the instrument as "Louis Lacroix," and a mistaken insertion by the recorder of the name of "Louis" instead of "Joseph."—Williams v. Carpenter, 327.

9. *Confirmation, Certificate of — Nature and weight of, as Evidence.* — A certificate of confirmation under the act of 1824 does not convey title, but is merely *prima facie* evidence of the existence of certain facts at a former date, and may be rebutted or disproved by other competent evidence. It is in the nature of a deposition, and the testimony of witnesses or a deposition would be admissible to correct its errors.—*Id.*

10. *Hunt's Minutes, Evidence of what.*—The minutes of Recorder Hunt, where objection is offered, are inadmissible as a deposition to prove the facts testified to by witnesses therein. But in the absence of any such objection, they are admissible, like any other document, to show what they contain. Whether or not the contents are relevant or competent on the issues in the case, must be determined by the general rules of evidence.—*Id.*

11. *Tax Title — Ejectment — Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863–4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—Abbott v. Lindenbower, 162.

12. *Tax Deeds — Proceedings under against persons not owners, would have what effect.*—A deed conveying the title under proceedings against a person who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and

LAND TITLES—(*Continued.*)

give it to another. (Rev. Act, art. 2, §§ 10, 29; Adj. Sess. Acts 1863–4; Gen. Stat. 1865, p. 100, § 13, p. 104, § 39, cited and compared.)—*Id.*

13. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax-books, and collection of taxes, and return of delinquent tax-lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*

14. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863–4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.—*Id.*

See LIMITATIONS, 1.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Lease—Tenancy from Year to Year—Tenancy at Will.*—Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract without any definite period for its termination, and in either case is construed to be a tenancy from year to year. But where a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, or where there is no express or implied consent, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice.—Grant v. White, 285

2. *Landlord and Tenant—Lease—Consent to continue in possession, how may be shown.*—Whether a possession is continued under an express or implied consent, is a question of fact. Circumstances may be sufficient to authorize a jury to infer an acquiescence on the part of the landlord in the tenant holding over. If the holding over by a tenant, after the expiration of his term of lease, is willful, it cannot be with consent either express or implied.—*Id.*, 286.

3. *Landlord and Tenant—Lease—Occupation under—Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.—*Id.*

4. *Landlord and Tenant—Lease—Possession—Construction of Statute.*—The provisions of section 27, chap. 187, Gen. Stat. 1865, cannot be invoked between the parties to an action for unlawful detainer, where defendant was lessee and held his possession under plaintiffs as lessors.—*Id.*

5. *Statute—Attornment—Possession.*—Under section 15 of Gen. Stat. 1865, p. 740, giving a key of premises to a third party by a tenant, without the consent of his landlord, is a void attornment, and in no wise affects the possession of the landlord.—Rutherford v. Ullman, 216.

LEASE.

1. *Landlord and Tenant—Lease—Tenancy from Year to Year—Tenancy at Will.*—Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period for its termination, and in either case is construed to be a tenancy from year to year. But where a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, or where there is no express or implied consent, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice.—Grant v. White, 285.
2. *Landlord and Tenant—Lease—Consent to continue in possession, how may be shown.*—Whether a possession is continued under an express or implied consent, is a question of fact. Circumstances may be sufficient to authorize a jury to infer an acquiescence on the part of the landlord in the tenant holding over. If the holding over by a tenant, after the expiration of his term of lease, is willful, it cannot be with consent either express or implied.—*Id.*
3. *Lease—Assignment—Formalities required.*—It is not requisite that the assignment of a lease made by a corporation should possess the characteristics of a deed. Being a note in writing, signed by the agent of the corporation, authorized in the manner required by law, it is clearly within the terms of the act concerning frauds and perjuries, and must be considered competent evidence to show the transfer of the leasehold.—Sandford et al. v. Tremlett, 384.
4. *Lease—Transfer—Individual—Corporation.*—An individual holding such a lease could transfer it without the formalities of a deed, and nothing more ought to be required of a corporation.—*Id.*
5. *Landlord and Tenant—Lease—Occupation under—Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.—Grant v. White, 286.
6. *Landlord and Tenant—Lease—Possession—Construction of Statute.*—The provisions of section 27, chap. 187, Gen. Stat. 1865, cannot be invoked between the parties to an action for unlawful detainer, where defendant was lessee and held his possession under plaintiffs as lessors.—*Id.*

LIENS.

See MORTGAGES AND DEEDS OF TRUST, 5. PARTITION, 1.

LIMITATIONS.

1. *Limitations—Adverse Possession.*—A defendant, setting up the defense of the statute of limitations against the legal title, must show that his possession was adverse under claim of ownership, and that it had continued a sufficient length of time to bar the owner and those claiming under him. The burden of proof is upon the defendant to show at what time his possession became adverse to the legal title.—Doan v. Sloan, 106.

M

MARRIAGE SETTLEMENTS.

See CONVEYANCES, 7, 8, 9. EXECUTIONS, 1. HUSBAND AND WIFE. PRACTICE, CIVIL—PARTIES, 8.

MANDAMUS.

1. *Mandamus — Payment by State Treasurer — Authority.*— Mandamus will not lie to compel the State treasurer to pay over the principal and interest of State bonds, without a special act of the legislature authorizing and commanding him to pay. Without such special act, he has no power to pay any money, except upon the warrant of the auditor drawn upon some appropriated fund.—State of Missouri ex rel. Third National Bank of Missouri v. Bishop, 505.
2. *County Courts — Repairs of County Buildings — Mandamus — Injunction.*— Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.—Vitt v. Owens, 512.
3. *Public Printer—Appendix—Price allowed.*—Under the twenty-first section of the act concerning the public printer (Gen. Stat. 1865, p. 148), the appendix to the journal of either house of the General Assembly constitutes a part of the journal; and although the greater part of the reports and public documents incorporated in the appendix by virtue of that section had already been printed in the journal, under the order of the two houses, or in pursuance of a law of the State requiring it to be done, yet the public printer would be entitled to charge separately for it, at the prices regulated by law. (State ex rel. Dyer v. Thompson, 41 Mo. 240, affirmed.)—State ex rel. Foster v. Rodman, 176.

MORTGAGES AND DEEDS OF TRUST.

1. *Purchaser — Mortgagee — Redemption of Property.*— When the beneficiary or mortgagee becomes himself the purchaser, and there is any fraud touching the sale, he will be considered a mere mortgagee in possession, and the grantor will be entitled to the rights of a mortgagor, and be allowed to redeem the property by paying the debt and interest. But the purchaser will be considered the owner of the property until his debt is fully paid.—Rutherford v. Williams, 19.
2. *Mortgages — Outstanding Title — Forfeiture.*— A mortgagee of land, who was in possession after the condition of the mortgage was broken, could defend successfully against the mortgagor, or any person claiming under him, so long as the debt remained unsatisfied; and a purchaser of the land, under a judgment against the mortgagor, after the execution of the mortgage, would acquire nothing more than the equity of redemption.—Hubble v. Vaughan, 138.
3. *Deeds of Trust — Notes — Priority of Payment — Special Contract.*— The principle of law that, where a deed of trust secures several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in

MORTGAGES AND DEEDS OF TRUST—(*Continued.*)

which they mature, can have no application to a case where the parties have specially agreed that payments shall be made transversely, and that the note last falling due shall have the priority of lien. And it does not alter the case that, by a provision of the deed, the grantor was expressly authorized to pay off the note first maturing at any time. This provision does not empower him to use the property encumbered by the trust for that purpose, without the consent or approbation of the securities upon the last maturing note.—Ellis, Adm'r, v. Lamme, 153.

4. *Deed of Trust—Sale—Payment by Note; when considered Cash.*—The terms of a deed of trust required that the real estate therein mentioned should be sold "for cash." Subsequent to the execution of the deed, and prior to the sale, the property became encumbered with various liens. At the sale, the purchaser paid for the property only a portion of the sum named as the purchase money, but gave his notes to the holders of the liens for the balances due them, over and above the amounts realized by them at the sale; and, in consideration of these notes, the lien-holders yielded up all their claims against the maker of the deed of trust: *Held*, that the notes so given were equivalent to cash placed in the hands of the trustee.—Mead v. McLaughlin, 198.

5. *Trustee—Purchase—Priority of Lien.*—The rule requiring the trustee to manage the trust estate for the benefit of his *cestui que trust* would not prevent his purchasing a lien against the estate, when this lien was subsequent, in point of time, to the execution of the deed under which the trustee acted, and to all other liens on the property. It was the interest of the trustee, in such case, to make the property realize not only the amount of the lien so purchased by him, but of all other liens which were prior and superior to his own.—*Id.*

6. *Evidence—Original Deed of Trust and certified copy—Variance.*—Where notice of the sale of real estate under a deed of trust was published in a locality required by the deed, and all parties concerned in the sale had actual notice thereof, the publication was sufficient, although the certified copy of the record of the deed from the recorder's office made it appear that notice was to be published elsewhere; and the parties to the instrument must be held bound by its true reading.—Jones v. Moore, 413.

N

NEW TRIAL.

See PRACTICE—SUPREME COURT, 3.

O

OFFICERS.

See COUNTY AUDITOR, 1, 2. PRACTICE, CIVIL. ACTIONS, 1, 2, 5, 12. PLEADINGS, 5. PUBLIC PRINTER, 1. REVENUE, 1, 2, 4, 5.

P

PARTITION.

1. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others

PARTITION—(*Continued.*)

for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust used by implication to a certain proportion of the estate. When trust money is issued by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.—White v. Drew, 561.

2. *Partition — Trust Estates, Dower in.* — The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*Id.*

PARTNERSHIP.

1. *Partnership — Contract.*—A contract made with a party is not binding upon a partnership into which he subsequently enters, unless the firm assent thereto.—Deere v. Plant, 60.
2. *Partnership Settlements — Outgoing Partner — Purchase of share of.* — Where the mode of partnership settlement and division of the partnership property that is provided in the articles becomes impracticable, or can not be fairly carried into effect, courts may order a sale of the property; but effect will be given to a stipulation that one or more of the parties shall be entitled to purchase the share of the outgoing partner at a valuation.—Quinlivan v. English, 362.
3. *Partnership — Assignment — Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.—Kitchen v. Reinsky, 427.
4. *Partnership — Performance.* — Where the proposition to form a partnership for the purpose of buying and selling lands was accepted and acted upon, and the contract in all respects fully executed, it was too late to deny the existence of the contract or to complain of the manner in which it was entered into. After having received the full benefit of the transaction and availed himself of all the advantages arising from the services rendered by his copartner, a party ought not to be heard in an attempt to defeat a recovery by charging that such copartner had acted in bad faith with the parties of whom the land had been purchased.—Hunter v. Whitehead, 524.
5. *Partnership — What issues triable by the Court.* — Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.—*Id.*
6. *Administration — Partnership Estates — Appeal — What bond required.* — A surviving partner administering on partnership effects has all the rights,

PARTNERSHIP—(*Continued.*)

incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.)—Bruening v. Oberschelp, 276.

See PRACTICE, CIVIL—TRIAL, 17. SURETIES, 4.

PRACTICE, CIVIL.

1. *Attachment—Order of Publication—Sufficiency.*—The order of publication required by the attachment act of 1855 (R. C. 1855, p. 246, § 23) did not itself operate an attachment, but was intended to impart notice to defendant of the pending attachment. And a publication notifying defendant that his property is "about to be attached," is sufficient, within the meaning of the statute.—Harris v. Grodner, 159.

ACTIONS.

2. *County Collector—Refusal to issue Certificate—Action for Damages.*—A party cannot maintain an action for damages against the clerk of a county court for issuing a certificate of election to the office of State and county collector to another, and thereby depriving plaintiff of the emoluments of that office. The action for damages is predicated upon the idea that he is deprived of a legal and valid right. But plaintiff's proceeding is a virtual admission that the person to whom the certificate is issued is legally in possession of the office, and he cannot recover damages for being deprived of what does not belong to him. He cannot be permitted to disclaim his right to the office, and then have damages for being deprived of it.—State, to use of Bradshaw, v. Sherwood, 179.

3. *What remedies will lie.*—If the clerk refused to perform his functions in casting up the vote, or in issuing the certificate, an ample and complete remedy would be furnished by resorting to a mandamus; or, after the certificate was issued to the other party, and he had qualified, the title to the office could be tested and decided by a writ in the nature of a *quo warranto.*—*Id.*

4. *Statutory Rights—Relief—Jurisdiction.*—The principle that where a new right is conferred by statute, and a specific relief given for a violation of that right, all other jurisdictions are ousted, is not applicable to the present case.—*Id.*

5. *Pleadings—Jurisdiction—Question of, how raised.*—The objection raised by demurrer, that the court had no jurisdiction, would have been more properly raised by answer, inasmuch as the want of jurisdiction did not appear on the face of the petition. If the answer, when filed, denied the right of the plaintiff to the office, that would have amounted to an ouster of jurisdiction, because it would have made a contest indispensable. (Gen. Stat. 1865, p. 66, § 50.)—*Id.*

6. *County Collector—Right to Certificate—In what Court determined.*—The County Court was the tribunal in which the contest should have taken place, and the Circuit Court had no jurisdiction when the question concerning the right to the office was raised.—*Id.*

7. *Practice—Trespass—Action of, when brought—Construction of Statute.*—The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. Section 3, chap.

PRACTICE, CIVIL,—*Continued.*

163, p. 653, Gen. Stat. 1865, does not apply to actions of that description, but contemplates those where the suit was in the nature of a proceeding *in rem* affecting the land itself.—Hannibal & St. Joseph R.R. Co. v. Mahoney, 467.

8. *Practice—Joinder of Causes, legal and equitable—Election.*—Although under our present code a petition may embrace both legal and equitable causes of action, and will not for that reason be held bad upon demurrer, when the relief sought for under the different kinds of action is separately stated, yet the causes cannot be blended in the same trial. And the plaintiff may be compelled, upon motion, to elect on which cause of action he will proceed.—Bobb v. Woodward, 482.

9. *Practice—Actions—Recovery of Real Property—What the proper action for.*—Where the principal object sought to be accomplished by the plaintiff is to recover possession of real estate, a proceeding in the nature of a bill in equity is not the proper remedy. An adequate remedy at law for that purpose has been provided in the action of ejectment.—*Id.*

10. *Practice—Notice of Suit—Order of Publication.*—The true meaning of the statute concerning notice of suit to non-residents (Gen. Stat. 1865, chap. 164, § 13) is that the notice shall go to the extent of a substantial statement of all the objects of the suit; and notice by publication that the object of a suit was "to set aside" a deed conveying certain property, without any general statement of the grounds upon which the decree was prayed for, is insufficient, and a judgment rendered upon such a notice is null and void.—*Id.*

11. *Actions—Malicious Prosecution, grounds of.*—In an action for malicious prosecution, malice and want of probable cause together constitute the ground upon which alone the plaintiff can recover. The existence of both must be made to appear, although direct proof of malice is not necessary where the want of probable cause is satisfactorily established. In such cases the prosecution must be wholly ended and determined, but proof of innocence is not necessary to support the action.—Moore v. Sauborin, 490.

12. *Mandamus—Payment by State Treasurer—Authority.*—Mandamus will not lie to compel the State treasurer to pay over the principal and interest of State bonds, without a special act of the legislature authorizing and commanding him to pay. Without such special act, he has no power to pay any money, except upon the warrant of the auditor drawn upon some appropriated fund.—State ex rel. Third National Bank v. Bishop, 504.

13. *Statutory Actions—Averments.*—In a statutory action against a constable for wrongful attachment, the petition need not declare specifically that at the time of the attachment and levy the plaintiff was not a non-resident, nor was about to move out of the State with intent to change his domicile.—State, to use of Ladd, v. Clark, 519.

14. *Practice—Statutory Action—Proviso, must be pleaded.*—If the proviso contained in a statute furnishes matter of excuse for the defendant, it need not be negatived in the petition, but he must plead it. And it makes no difference whether the proviso be contained in the enacting clause or be subsequently introduced in a distinct form. It is the nature of the exception, not its location, which ought to govern.—*Id.*

15. *Practice—Statutory Actions—Exceptions in Statute—Pleading.*—Where in the same section of the statute in which the right of action is given the

PRACTICE, CIVIL—(*Continued.*)

exception is contained, and it clearly appears that the plaintiff cannot maintain his cause of action without negativing the exceptions, then the petition must be so framed as to show specifically that the party sued is not within such exceptions. But if plaintiff's right of action is complete under a statute, and there is a provision or exception either in that or some other statute which may be made available to defeat it, then the matter must be taken advantage of by way of defense.—*Id.*

16. *Practice—Replevin—Trusts not recognized by action of.*—In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or of the equities of the wife.—Pawley v. Vogel, 291.

17. *Bridges—Covenants to repair—Actions.*—Where a party entered into a bond obligating himself to build a certain bridge, and guaranteeing that the same should stand and remain for four years, and subsequently within that period said bridge got so out of repair as to be unsafe, his sureties became liable to an action for breach of covenants contained in said bond, even though the builder and his sureties on the bond had no written notice stating the repairs necessary to be made and requiring the same to be done. Sections 16 and 17, p. 326, R. C. 1855 (Gen. Stat. 1865, §§ 17, 18, p. 299) afford a cumulative remedy wholly independent and distinct from an action on the bond. The bond contained an express covenant, and no written notice was required to the undertakers or their securities to hold them responsible on their obligation. The stipulations bound them to fulfill their engagements, and any breach that accrued they were required to take notice of.—Buchanan County v. Kirtley, 534.

18. *Pleadings—Allegations.*—An allegation of notice in plaintiff's petition was immaterial, and should have been treated as surplusage.—*Id.*

See COURTS, COUNTY, 1, 2. DAMAGES, 4. HUSBAND AND WIFE. REVENUE, 2, 3, 7.

APPEALS.

1. *County Court—Appeals from—Jurisdiction of Circuit Court.*—Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.—County of St. Louis v. Lind, 348.

2. *County Court, appeal from—Action of the inferior court must be affirmed or reversed.*—The failure to find any error in the proceedings on such an appeal is not proper ground for dismissing the appeal. The question presented by the record should be passed upon by the Circuit Court.—*Id.*

3. *Practice—Circuit Court—Appeal—Errors on the face of the Record, how revised.*—Where the error complained of in an appeal from the Circuit Court is apparent on the face of the record, it may be revised without the saving of exceptions or the filing of a motion for new trial.—Hannibal and St. Joseph Railroad Company v. Mahoney, 467.

PRACTICE, CIVIL—(*Continued.*)

4. *Practice — Appeal — Failure to Prosecute.*— Where the record of a case shows that an appeal was taken therein more than thirty days prior to the term of this court, when the same is called for hearing and appellant has entirely failed to prosecute his suit, no cause being shown for the delay on the part of appellant, the judgment of the lower court will be affirmed. — Trumbo's Adm'r v. Trumbo, 500.

5. *Practice — Appeals — Filing of Transcript.*—Where the record of a cause shows that an appeal therein was taken to this court more than thirty days before the first day of the term in which the same is called for hearing, and that no transcript was filed by the appellant, and no satisfactory reason is shown why it was not filed, the judgment of the lower court will be affirmed.— Williams v. Fiegler, 503.

6. *Damages — Appeal — Practice.*— Where plaintiff, having claimed treble damages, was allowed single damages only, and failed to appeal from the judgment of the court, but the case was carried to the District Court by defendant, it was error to reverse the decision below and award plaintiff treble damages.—Schmidt v. Densmore, 225.

7. *Probate Court — Appeals — Bonds — Judgment against Securities.* — The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court.—Dubois' Adm'r v. Walsh, 273.

8. *Administration — Partnership Estates — Appeal — What bond required.*— A surviving partner administering on partnership effects has all the rights, incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.) — Bruening v. Oberschelp, 276.

9. *Practice, Civil — Appeals — Act establishing District Courts — Power of Circuit Judge to grant Appeals in Vacation.*— Where, nineteen days after the entry of a judgment in a Circuit Court, and in vacation, the judge before whom the cause was tried indorsed upon the transcript an order allowing an appeal to the District Court, and no reason was given for making this order, and no statement made in reference to it, except that it was done upon an inspection of the record: *held*, that such appeal was improperly entertained by the District Court, and ought to have been dismissed. Although in the act establishing District Courts the legislature failed to designate in express terms the manner of taking appeals or prosecuting writs of error from the Circuit Court, it evidently intended to make the provisions of the act of 1855 applicable to the new system contemplated by the constitution. Hence, to take an appeal from the Circuit to the District Court in all respects regular and proper, it is still necessary to comply with the provisions of that act — no provision of the statute, either expressly or by inference, authorizing the judge of a Circuit Court in vacation to make an order allowing such appeal. The powers formerly conferred upon the Supreme Court or any judge thereof to act in similar premises, have not been transferred to the District Courts.— Jefferson City Savings Association v. Morrison, 515.

PRACTICE, CIVIL—(*Continued.*)

10. *Appeal, failure to prosecute.*—When no steps are taken to prosecute an appeal, the judgment of the court below will, on motion, be affirmed.—Coker v. Scott, 518.

11. *Practice—Trial—Appeal—Review of Evidence—Causes at Law and in Equity distinguished.*—In common-law proceedings, as to questions of fact which are properly triable before a jury or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.—King v. Moon, 551.

See JUSTICES' COURTS, 4.

PARTIES.

1. *Corporations—Citizenship.*—A corporation may be a citizen of a State, for the purpose of suing and being sued in the courts of the United States.—Herryford v. Ætna Insurance Company, 148.

2. *Corporations—Citizenship in other States.*—Although a corporation may act by agents beyond the bounds of the State which created it, and become, constructively, resident of this State under the statute, not only for the purpose of suing and being sued, but for the purposes of taxation in respect to property found here, yet it does not follow that the corporation must therefore cease to be a citizen of another State, within the act of Congress of Sept. 24, 1789.—*Id.*

3. *Husband and Wife—Joinder of Parties—Ante-Nuptial Settlements—Debts of Wife contracted prior to Marriage—Liability of Husband for.*—The right of a creditor to a judgment against both husband and wife for the debt of the latter cannot be destroyed by virtue of a contract between them that each should have the exclusive ownership and control of their own property, and that the separate property of each should be exempted from liability for the debts of the other contracted previous to the marriage.—Obermeyer v. Greenleaf, 304.

4. *Parties to Actions—Who are real parties in interest.*—Where the lessee of certain real estate assigned to a third party his interest in the leasehold, he cannot bring an action in his own name to the use of the executors of the original lessor against the assignee of the leasehold. Under section 2, chapter 161, Gen. Stat. 1865, the action should be commenced by the executors in their own names.—Weise, to use of Walker, v. Gerner, 527.

See PRACTICE. PLEADINGS, 10.

PLEADINGS.

1. *Attachment—Plea in Abatement—Answer.*—Where, in a suit by attachment, defendant pleads in abatement, and the issue is found in his favor, and he afterward answers, setting up the defense that neither plaintiff nor defendant resided in the county in which the suit was brought, the ruling of the court in causing the same to be stricken out was erroneous. Under the 42d section of the present attachment act (Gen. Stat. 1865, p. 567), the suit should have been proceeded upon to final judgment as though commenced by summons alone; and in suits so commenced, one of the parties must reside in the county where suit is brought in order to confer jurisdiction. (Gen. Stat. 1865, p. 653, § 1.) Hence, the answer, if true, was a complete bar to the action.—Peery v. Harper, 131.

PRACTICE, CIVIL—(*Continued.*)

2. *Pleadings — Exceptions.*— Where a plea in abatement, and demurrer, were both overruled, and defendant was permitted to file his answer, and the cause proceeded to trial on the merits, without objection or exception, questions concerning the pleadings ruled upon by the court were afterward wholly irrelevant.—Ellis, Adm'r, v. Lamme, 153.

3. *Trial — Petition — Notes, treated as evidence of debt — What time given defendant to answer.*—Where the cause of action set out in the petition was for work and labor done, with a separate statement of the amount of each account, coupled in every case with reference to papers attached to the petition in the following form: "as will more fully appear by the evidence of indebtedness herewith filed" — it was immaterial to inquire whether these "evidences of indebtedness" were, in point of fact, notes for the direct payment of money or not. Plaintiff having elected to declare upon the original cause of action in this manner, defendant was entitled to six days within which to plead; and the court will, on motion at a subsequent term, the irregularity being shown to its satisfaction, set aside a judgment given for plaintiff within that time, or do whatsoever the justice of the case may require.—Smith v. Best, 185.

4. *City Ordinances — City Charters — How set forth in Pleading.* — Where a party asserts a right founded upon provisions of city or town ordinances, the pleading must set forth those provisions in whole or in substance. The courts cannot take judicial notice of such ordinances. But when the material allegations of an information were founded upon a city charter, and the act was pleaded by its title, the court, under section 40 of the practice act (Gen. Stat. 1865, p. 661), could take judicial notice of its provisions.—State v. Oddle, 210.

5. *Quo Warranto — Office of City Treasurer — Information relating to — Pleading — What Averments sufficient.*—Where, by the terms of a city charter, the corporate powers were vested in a mayor and councilmen, to be elected by the qualified voters of the city, and power was expressly given to the mayor and council to appoint a city register, collector, and such other officers as they might at any time deem necessary, the averment contained in an information claiming the office of city treasurer, that the mayor and city councilmen had been duly elected, and the relator duly appointed and qualified, was a sufficient allegation of these main facts. If there were any ordinances defining the manner of election or appointment, it would devolve upon defendant, under the pleading, to produce them, and show that either the election of the mayor and councilmen, or the appointment of the treasurer, had not been conducted in conformity therewith, when the relator had first produced sufficient *prima facie* evidence to sustain his information.—*Id.*

6. *Practice — Pleading made more definite, at whose instance — Construction of Statute.*— The provision of the practice act (Gen. Stat. 1865, chap. 165, § 20) that the court may require a pleading to be made more definite and certain, would seem to imply that it must be done on motion of the adverse party.—*Id.*

7. *Foreign Insurance Agencies — Pleading — Waiver.*—Under the first section of the act concerning foreign insurance agencies (R. C. 1855, p. 885, § 1), a corporation has the same right to remove a suit brought against it, into the courts of the United States, that any other citizen of another State would have when sued in this State. Nor did it waive this right by answering and pro-

PRACTICE, CIVIL—(*Continued.*)

ceeding to trial after such removal had been refused. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction.— Herryford v. Ætna Insurance Company, 148.

8. *Causes—Application for removal to U. S. Courts—Effect.*— When a corporation makes an application for a removal of the cause to the United States Circuit Court, in the manner required by the act of Congress, it is error in the State court to proceed further in the matter, and any subsequent step is *coram non judice.—Id.*

9. *Statute of Insurance—Intent and Effect.*—It was not the intention of the statute of this State concerning foreign insurance agencies (R. C. 1855, p. 885, § 1, and Gen. Stat. 1865, p. 402, § 3) to preclude the party from making this application. Its proper effect is merely to make the service of process on the agent of the company in this State binding on the corporation, for the purpose of giving the court jurisdiction over the party.—*Id.*

10. *Statute of Insurance—Foreign Agency—Process.*—This statute gives all the facilities for serving the ordinary process of law upon the foreign corporation which takes up its residence in this State, by establishing an agency here under its provisions, that would exist in reference to a corporation chartered by the legislature of this State.—*Id.*

11. *Practice—Defenses and Counter Claims, how distinguished.*—A counter claim, as understood in the act relating to practice in civil cases (Gen. Stat. 1865, chap. 1865, §§ 12, 13), must be of the nature of a cause of action at law. Different defenses or counter claims may be separately stated in the same answer; but equitable matter—that is, an equity of relief—can constitute a defense only, but not properly a counter claim. If it be not a defense, it can not be joined in the same suit with a cause of action at law.—Jones v. Moore, 413.

12. *Practice—Counter Claim; what cause of action not.*—A cause of action which wholly defeats the demand of the plaintiff cannot be a counter claim.—*Id.*

13. *Practice—Recoupment and set-off, what.*—A recoupment or set-off is not of the nature of a defense or plea in bar, but admits the cause of action and claims an allowance in diminution of the plaintiffs' demand, and it is not a counter claim.—*Id.*

14. *Pleadings—Motion for New Trial—Supreme Court.*—The failure of a party appellant to file his motion for new trial or in arrest of judgment, thereby giving the Circuit Court no opportunity to correct its own errors, is fatal to an application for a review of the proceedings in this court.—Morgner v. Kister, 466.

15. *Practice—Demurrer—Amendment—Judgment.*—Where, upon demurrer, a petition is held insufficient as to certain defendants, and plaintiff failed to amend, such defendants are entitled to a final judgment and discharge.—Bobb v. Woodward, 482.

16. *Practice—Answer—New Matter—Failure to Reply—Testimony.*—Under the sixteenth and twenty-sixth sections of chapter 165 of the practice act (Gen. Stat. 1865, pp. 659, 661), where defendant's answer set up new matter amounting to a substantial defense, and plaintiff failed to reply thereto, such matter stood confessed and entitled defendant to judgment. He was not bound to introduce any evidence upon that point; and this court will not look to the

PRACTICE, CIVIL—(*Continued.*)

bill of exceptions for the purpose of ascertaining whether it is sustained by the proof made or not.—Moore v. Sauborin, 490.

17. *Administration—Set-off against suit of Administrator, when admissible.*—The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.—Shannon's Adm'r v. Dinan, 269.

18. *Railroad Companies — Negligence — Pleading — Counter Claim.*—Where suit was brought against a railroad company for damages in killing a horse, and the answer merely alleged that plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that, by means of that act of gross negligence on the part of the plaintiff, the animal got on the track and was run over, whereby the cars were thrown off the track and injured to the amount of five thousand dollars: *held*, that the answer contained no special defense to plaintiff's cause of action, nor a counter claim in the nature of a set-off. It was simply a counter claim in the nature of a cross action, and was properly stricken out on motion. The counter claim, as an independent cause of action arising out of the same transaction, stated no additional facts which, those in the petition being admitted, would have entitled defendant to a several judgment against plaintiff.—Tarwater v. Hannibal and St. Joseph Railroad Company, 193.

19. *Negligence — Pleadings — Averments.*—Whether or not a given state of facts amount to negligence, or to any proof of negligence, is a question of law. And an averment that an act was done carelessly and negligently, so far as it goes beyond a bare statement of the facts themselves, avers a matter of law only, of which the court, and not the party himself, must be the judge. Where the answer sets up as a defense the negligence of plaintiff, it should be alleged as a main fact, which might be proved by evidence of other facts and circumstances from which negligence might be inferred by a jury.—*Id.*

20. *Practice—Ejectment—Counter Claim—Specific Performance.*—Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father.—Harris v. Vinyard, 568.

21. *Pleading—Averments.*—Where enough appears in the body of the petition to show the object of the suit, and the real parties for whose use and benefit it was prosecuted, it substantially complies with the rules of pleading (Gen. Stat. 1865, p. 658, § 3) as recognized by the former decisions of this court.—State, to use of Worth County, v. Patton, 531.

PRACTICE, CIVIL—(*Continued.*)

22. *Pleading — Title.*—The want of a proper statement of the parties in the caption of the petition is not fatal when it is supplied in the body of the pleading by a substantial averment showing the capacity of the plaintiff to sue and recover upon the cause of action.—*Id.*

23. *Pleading — Demurrer, objections raised by.*—The objection that plaintiff's petition does not state facts sufficient to warrant the plaintiff to sue, because his representative character is not sufficiently set out and averred, should be raised by demurrer. Otherwise, under the present system of pleading, it will be presumed to be waived. (Gen. Stat. 1865, p. 658, §§ 6, 10.)—Weldon's Adm'r v. Hobbs, 537.

24. *Pleading — Executorship — What averment of sufficient.*—Where, in the body of the petition, it is averred that plaintiff is the acting and lawful executor of the last will and testament of the deceased, the averment is amply good, in the absence of any objection, to sustain the cause, within the reasoning of the decision in the case of The State to the use of Tapley's Adm'r v. Matson, 38 Mo. 489.—*Id.*

25. *Pleading — Title.*—The description of administrator in the title may be wholly disregarded.—*Ib.*

26. *Pleading — Exceptions — Answer.*—If defendant wishes to avail himself of the error committed by the court in striking out his answer, he should let judgment go at the time and stand upon his exceptions. By pleading over and going to trial upon another issue, he voluntarily abandons whatever grounds he might have had for a review of the action of the court.—*Id.*

See PRACTICE, CIVIL — ACTIONS.

TRIALS.

1. *Instructions.*—Instructions based upon a state of facts not in evidence should not be given.—Turner v. Baker, 13.

2. *Instructions — Verdict — Reversal.*—The giving of such instructions, if the jury were thereby manifestly misled in their verdict, will be good ground for the reversal of the cause.—*Id.*

3. *Trial—Issues—What left to a Jury.*—The question of fact whether certain promises or assurances were fraudulently given and were the sole ground of the plaintiff's action, to his injury and loss and to the gain of the defendant, would more properly be submitted to the jury upon an issue directed to that question.—Rutherford v. Williams, 19.

4. *Practice — Instructions.*—The refusal by the court to pass upon instructions may be taken as a refusal to give them.—Karriger v. Greb, 44.

5. *Instructions — Evidence.*—There is no error in refusing to give instructions not sustained by any evidence.—*Id.*

6. *Practice — Trials — Evidence — Instructions—Error.*—If there be any competent evidence presented to support an issue, it is error in the court to instruct the jury that the party is not entitled to recover.—Deere v. Plant, 60.

7. *Trial — Evidence — Jury.*—Where any evidence exists tending to show facts which constitute a good defense, the case ought not to be taken from the jury.—Benton v. Klein, 97.

8. *Practice — Amendment — Parties — Trial.*—Where it appears at the trial that one of the parties has assigned all his interest in the matter in controversy to another, the court may amend the record and pleadings by allowing the

PRACTICE, CIVIL—(*Continued.*)

assignee to be added as a party to the record. (R. C. 1855, p. 1253, § 3.)—Wellman v. Dismukes, 101.

9. *Promissory Note — Verdict — Judgment.*—In an action upon a promissory note, where the answer simply denied the execution of the note, and the cause was submitted to the jury, it was their duty, under the provisions of Gen. Stat. 1865, chap. 169, §§ 21, 26, not simply to find a general verdict for plaintiff, but also to assess the amount due upon the judgment; and the court is not authorized to invade the province of the jury, and, in case of a general verdict by them, to proceed to ascertain the amount due upon the note and render judgment thereon.—Cates v. Nickell, 169.

10. *Trial — Motion to Correct Judgment.*— If a mere error or mistake in entering up a judgment is sought to be corrected, it can only be done by motion, filed within the proper time, and within the term at which the judgment was recorded. Such motion may, however, be continued over for cause, and determined at a subsequent term.—Smith v. Best, 185.

11. *Practice—Trial—Jury—When presumed to be waived.*—Where both parties to a suit are present and submit the cause to the court on the evidence, and neither of them demands a jury, it may be presumed that the right of trial by jury is waived.—Williams v. Carpenter, 327.

12. *Practice — Trial — Matters of Law and Equity to be tried separately.*— Where a matter of equity and an action at law are separately stated in the same petition or answer, the matter of equity and the matter of law must necessarily be separately tried or heard, for the reason that there is a constitutional right of trial by jury in the one case, and not in the other, and the nature of the judgment or relief given must in general be very different.—Jones v. Moore, 413.

13. *Practice — Trial — Affidavit — Admissions — Subsequent Trial.*— Plaintiff claimed certain property as purchaser at assignee's sale, and at the trial defendant obtained a continuance upon affidavit that testimony had been discovered, too late to be used in the trial, to prove that "one of the assignors" "was insolvent at the time he made the assignment, and that he made the same to hinder and delay creditors, and that the same is void;" but plaintiff elected to go into trial, and admitted the facts stated in the affidavit, and the case proceeded: *held*, that at a subsequent trial of the same cause such former admission of counsel could not be used in evidence, and the action of the court in excluding it operated no surprise to defendant, and constituted no ground for new trial. Plaintiff at most simply admitted that the statements of the affidavit were to be regarded as proved for the purposes of the previous trial. The admission was not in any sense one of record, and stood upon the same ground precisely as if the absent witness had himself been present and testified to the facts stated in the affidavit; and the fact that the admission was preserved in a bill of exceptions does not alter the case.—Kitchen v. Reinsky, 427.

14. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*— Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a

PRACTICE, CIVIL—(*Continued.*)

regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.—*Id.*

15. *Practice—Trial—Instructions—Evidence tending to prove an issue always submitted to a jury.*—An instruction declaring that upon the evidence a claimant cannot recover, is only justified or warranted where there is a total and complete failure of evidence to uphold a verdict. Where there is any evidence tending to prove the issue, it must be submitted to the jury.—Claflin v. Rosenberg, 439.

16. *Practice — Circuit Court—Jurisdiction of, when inquired into.*—The question whether the Circuit Court has jurisdiction of the cause may always be inquired into.—Hannibal & St. Joseph R.R. Co. v. Mahoney, 467.

17. *Practice—Trial—Partnership—Dismissal of Suit—Construction of Statute.*—Where a receiver in a partnership suit made a report showing on its face *prima facie* evidence of a full settlement of all matters in controversy between the parties, it was proper for plaintiff to dismiss his suit without proceeding further, under Gen. Stat. 1865, p. 662, § 47. Had it been manifest that the rights and interests of defendant would be prejudiced thereby, a dismissal of the case might have been erroneous, notwithstanding the above provision.—Worthington v. White, 462.

18. *Practice — Trial — Instructions.*—Where the instructions taken as a whole present the law of the case correctly, any objection to any one by itself, though good, will not be considered a misdirection of the jury.—Moore v. Sauborin, 490.

19. *Practice—Submission of Cause — Finding — Continuance.*—Where, upon the trial of a cause, the court found that plaintiff was not entitled to recover on the proof given, and, without entering judgment of record, continued the cause, such action was simply an exercise of the power of the court to grant a new trial; and this court will not review its action in granting the same.—Simpson v. Blunt, 542.

20. *Sureties — Notice to Sue — Waiver.*—Where the security upon a note gave the holder notice in writing to bring suit immediately, but delay was caused by defendant himself, he is presumed to have waived the requirements of the statute concerning the time within which such suits are to be brought. (Gen. Stat. 1865, p. 406, §§ 1, 2.)—*Id.*

21. *Partnership — What issues triable by the Court.*—Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.—Hunter v. Whitehead, 524.

22. *Practice — Ejectment — Counter Claim — Specific Performance.*—Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of

PRACTICE, CIVIL—(*Continued.*)
title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father.— Harris v. Vinyard, 568.

PRACTICE, CRIMINAL.

1. *Indictments — Sufficiency.*— In an action for perjury, for falsely taking a certain prescribed oath, where a part only of the oath was falsely taken, the indictment need not set out the whole, but may set out merely that portion of the oath taken which contained the falsehood.— State v. Neal, 119.
2. *Assault to Kill — Indictment — Averments — Construction of Statute.*—An indictment alleging that defendant, "feloniously, on purpose, and willfully," etc., "did then and there make an assault with the intent him, the said," etc., "then and there to kill," etc., but omitting to charge that the offense was committed "with malice aforethought," would be fatally defective under section 29, chapter 200, Gen. Stat. 1865, but is good and sufficient within the terms and meaning of section 32 of the same chapter. That the prosecutor used some of the terms embodied in section 29, such as "on purpose, and with a deadly weapon," is not to be regarded as absolutely conclusive that the indictment can be founded on that section only. These words may be treated as mere surplusage, and there will still remain a complete and sufficient description of an offense as designated in section 32.— State v. Seward, 206.
3. *Criminal Law — Conspiracy — Evidence — Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the acts of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.— State v. Louisa Daubert, 239.
4. *Criminal Law — Conspiracy — Evidence — Order of introduction of testimony.*— Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.— *Id.*
5. *Practice, Criminal — Indictment — Motion compelling to elect.*— The practice is now well settled that a motion to compel the prosecuting attorney to elect upon which count of an indictment he will proceed is addressed to the sound discretion of the court trying the case, and the Supreme Court will not interfere with that discretion unless it is apparent that it has been exercised oppressively or to the manifest injury of the accused. Where the offense charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and whenever there is a legal joinder, the court may exercise its discretion as to an election.— State v. Henry Daubert, 242.
6. *Practice, Criminal — Indictment — Nolle Prosequi.*— Where two defendants were jointly charged, in the same indictment, on two counts: 1, for larceny,

PRACTICE, CRIMINAL—(*Continued.*)

and 2, for receiving stolen goods, it was error to permit the circuit attorney to enter a *nolle prosequi* against one defendant upon the first count, and against the other upon the second. The two remaining counts really constituted two indictments, requiring different kinds of proof and separate and independent verdicts.— *Id.*

7. *Practice, Criminal — Indictment — Larceny — Evidence, what admissible*— Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.— *Id.*

8. *Practice, Criminal — Evidence — Verdict.*— If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.— *Id.*

9. *Practice, Criminal—St. Louis Court of Criminal Correction—Indictment—Information.*—Under the act creating it (Sess. Acts 1868, p. 269), the St. Louis Court of Criminal Correction could properly proceed upon information against persons charged with any of the offenses named in section 8, chapter 206, Gen. Stat. 1865, when committed within its proper jurisdiction. By that section such offenses are in terms made misdemeanors, and are therefore subject to an information, notwithstanding the provisions of section 24, article 1, of the Constitution of Missouri. Misdemeanors were not intended to be embraced in the words "indictable offenses," as used in that section, but only felonies.— State v. Berlin, 572.

10. *Witnesses — Husband and Wife — Information.*— The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.— *Id.*

11. *Practice, Criminal — Indictment — Appeal, without Final Judgment.*— Where the record simply shows that the court below quashed an indictment, but no final judgment was rendered, nor was the defendant discharged, no appeal will lie from the action of the court.— State v. Smith, 550

See CRIMINAL LAW. PRACTICE — SUPREME COURT, 2.

PRACTICE, SUPREME COURT.

1. *Supreme Court — Instructions — Evidence.*— It is not the province of the Supreme Court to determine the force or effect of conflicting testimony. But it may consider what the evidence on either side tended to prove, and what not. Instructions should be given or rejected upon the case made by the evidence. Theoretical propositions, for which there is no proper foundation in the evidence, or which suppose a different state of the case from that which is proved, should not be given, for they directly tend to mislead the jury.— McKeon v. Citizens' Railroad Company, 79.

2. *Practice, Criminal—Appeals—Neglect to file statements, etc., how treated.*— In appeals from the Criminal Court, where no statement or briefs are filed, the case will be dismissed. In these cases the Supreme Court is governed by the practice in civil cases, and not by the act concerning criminal practice.— State v. Hunter, 238.

PRACTICE, SUPREME COURT—(*Continued.*)

3. *Pleadings — Motion for New Trial — Supreme Court.* — The failure of a party appellant to file his motion for new trial or in arrest of judgment, thereby giving the Circuit Court no opportunity to correct its own errors, is fatal to an application for a review of the proceedings in this court.— Morgner v. Kister, 466.

PRINCIPAL AND AGENT.

See AGENCY.

PROHIBITION, WRIT OF.

1. *County Courts — Repairs of County Buildings — Prohibitions.*—The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. (Gen. Stat. 1865, ch. 36, and ch. 137.) These matters belong to the administrative and ministerial functions of the County Court, and not to the judicial branch of their jurisdiction. And for this reason it has been decided that even a prohibition will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. Even where a court of equity has jurisdiction to grant an injunction to restrain proceedings at law, it is never granted directly against a court, like a prohibition, but only against the persons who are parties to such proceedings, without impeaching the jurisdiction of the court itself.—Vitt v. Owens, 512.
2. *County Courts — Repairs of County Buildings — Mandamus — Injunction.*— Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.—*Id.*
3. *Collections — Settlement of Accounts — Notice.* — The statute concerning the settlement of claims and accounts by collectors of revenue (Gen. Stat. 1865, p. 87, §§ 16, 19) is sufficient notice to the collector of the authority of the auditor to adjust his (the collector's) accounts and strike a balance, when he fails to exhibit them within the required time.— Casby v. Thompson, 133.
4. *Auditors — Writs of Prohibition.* — The duties of an auditor in proceeding against defaulting collectors, under such circumstances, are executive and ministerial, and not judicial; and, under the rule laid down in the case of The State ex rel. West v. Clark County Court (41 Mo. 44), a writ of prohibition against him will not lie.—*Id.*
5. *Writs of Prohibition — Meaning of Phrase as used in the Statute.* — The words "writ of prohibition," occurring in the act concerning injunctions (Gen. Stat. 1865, chap. 167, § 24), are used in the general sense of a restraint by injunction, and not in their technical sense.—*Id.*

PROHIBITION, WRIT OF—(*Continued.*)

6. *Clerk—Authority.*—The clerk of a Circuit Court, in vacation, has no power to issue a writ of prohibition.—*Id.*

PUBLIC PRINTER.

1. *Public Printer—Appendix—Price allowed.*—Under the twenty-first section of the act concerning the public printer (Gen. Stat. 1865, p. 148), the appendix to the journal of either house of the General Assembly constitutes a part of the journal; and although the greater part of the reports and public documents incorporated in the appendix by virtue of that section had already been printed in the journal, under the order of the two houses, or in pursuance of a law of the State requiring it to be done, yet the public printer would be entitled to charge separately for it, at the prices regulated by law. (State ex rel. Dyer v. Thompson, 41 Mo. 240, affirmed.)—State ex rel. Foster v. Rodman, 176.

R

RAILROADS.

1. *Railroads—County Court—Subscription—Election—Construction of Statute.*—The power given by section six of the act to incorporate the Platte City and Fort Des Moines Railroad Company (Adj. Sess. Acts 1859-60, p. 443), to the County Court of Platte county, to subscribe capital stock to said company, is, by section eight of the same act, made subject to the general railroad law. (R. C. 1855, p. 427, § 30.) And the true meaning and effect of this law is, that an election to ascertain the sense of the tax-payers as to such subscription is a necessary condition of the power to subscribe. A subscription made without such election was without authority of law, and void.—Leavenworth and Des Moines Railroad Company v. County Court of Platte County, 171.
2. *Railroad Companies—Negligence—Pleading—Counter Claim.*—Where suit was brought against a railroad company for damages in killing a horse, and the answer merely alleged that plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that, by means of that act of gross negligence on the part of the plaintiff, the animal got on the track and was run over, whereby the cars were thrown off the track and injured to the amount of $5,000: *held*, that the answer contained no special defense to plaintiff's cause of action, nor a counter claim in the nature of a set-off. It was simply a counter-claim in the nature of a cross action, and was properly stricken out on motion. The counter claim, as an independent cause of action arising out of the same transaction, stated no additional facts which, those in the petition being admitted, would have entitled defendant to a several judgment against plaintiff.—Tarwater v. Hannibal and St. Joseph Railroad Company, 193.
3. *Railroad Companies—Stock—Uninclosed Lands.*—Under the decisions of this court, plaintiff had the lawful right to turn out his horse upon the uninclosed lands adjoining the railroad.—*Id.*
4. *Negligence—Pleadings—Averments.*—Whether or not a given state of facts amount to negligence, or to any proof of negligence, is a question of law. And an averment that an act was done carelessly and negligently, so far as it goes beyond a bare statement of the facts themselves, avers a matter of law only, of which the court, and not the party himself, must be the judge.

RAILROADS—(*Continued.*)

Where the answer sets up as a defense the negligence of plaintiff, it should be alleged as a main fact, which might be proved by evidence of other facts and circumstances from which negligence might be inferred by a jury.—*Id.*

5. *Railroad Companies — Liability — Accident.*—Railroad companies may be liable in these cases for unavoidable accidents or simple misadventure, but the owner of cattle in such case would not be liable; but otherwise, where one willfully drives cattle upon a railroad track.—*Id.*

6. Decision in case of Tarwater v. Hannibal and St. Joseph Railroad Company (*ante*) affirmed. —Vickers v. Hannibal & St. Joseph R.R. Co., 198.

7. *Corporations — Railroad Companies — Eminent Domain, when granted.*— Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion.—Dietrich v. Murdock, 279.

8. *Corporations—Railroad Companies—Lands—Permission to occupy — Effect of.*— Whether the proceedings of the railroad corporation were sufficient to divest the title of the owner of the land upon which the road was located, or whether he thereby had any notice of an intention on the part of the company to take any portion of his land, is immaterial, if for a number of years after the initiatory steps taken for the location and construction of the road there was no attempt on his part to prevent the execution of the work. In such case it must be assumed that the occupation of his land by the company for the purpose to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and, if compelled to leave the premises by proper proceedings, would permit such property to be removed.—*Id.*

9. *Railroad Companies — Consolidation.*—Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation. –Powell v. North Mo. R.R. Co., 63.

10. *Railroad Companies — Amalgamation.*—An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation.—*Id.*

See CONTRACTS, 2. CARRIERS.

RAILROADS, STREET.

1. *Street Railroads — Statute — Construction.* — The effect and intention of the act concerning street railroads, approved January 16, 1860, is that, when

RAILROADS, STREET—(*Continued.*)

the injury of the passenger is occasioned by his getting on or off the car at the forward platform, it shall be presumed as a matter of law that the negligence to the passenger himself contributed to produce the injury.—McKeon v. Citizens' R. R. Co., 80.

2. *Railroad Companies — Responsibility.* — Street-railroad companies are not responsible for the crimes of an employee; nor liable for his acts of willful and malicious trespass. They are only answerable for his negligence, or incapacity, or unskillfulness, in the performance of the duties assigned to him.— *Id.*

REGISTRATION.

1. *Registration of Voters—Appointment of Registers.*—Under the second section of the act to provide for the registration of voters (Gen. Stat. 1865, p. 905), the registers in the election districts appointed in July, 1866, hold for two years; and when the new county supervisor of registration was elected in November, 1866, the appointment of new registers did not devolve upon him. —State ex rel. Shields v. Smith, 506.

REPLEVIN.

See TRUSTS, 2.

REVENUE.

1. *Collections — Settlement of Accounts — Notice.* — The statute concerning the settlement of claims and accounts by collectors of revenue (Gen. Stat. 1865, p. 87, §§ 16, 19) is sufficient notice to the collector of the authority of the auditor to adjust his (the collector's) accounts and strike a balance, when he fails to exhibit them within the required time.— Casby v. Thompson, 133.

2. *Auditors—Writs of Prohibition.*— The duties of an auditor in proceeding against defaulting collectors, under such circumstances, are executive and ministerial, and not judicial; and, under the rule laid down in the case of The State ex rel. West v. Clark County Court (41 Mo. 44), a writ of prohibition against him will not lie.—*Id.*

3. *Writs of Prohibition — Meaning of Phrase as used in the Statute.* — The words "writ of prohibition," occurring in the act concerning injunctions (Gen. Stat. 1865, chap. 167, § 24), are used in the general sense of a restraint by injunction, and not in their technical sense.—*Id.*

4. *Clerk—Authority.*—The clerk of a Circuit Court, in vacation, has no power to issue a writ of prohibition.—*Id.*

5. *Legislature — Powers — Tax Deeds.* — The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.—Abbott v. Lindenbower, 162.

6. *Tax Title — Ejectment — Evidence.* — In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—*Id.*

7. *Tax Deeds—Proceedings under, against persons not owners, would have what effect.* — A deed conveying the title under proceedings against a person

REVENUE—(*Continued.*)

who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and give it to another. (Rev. Act, art. 2, §§ 10 and 29; Adj. Sess. Acts 1863-4—Gen. Stat. 1865, p. 100, § 13, p. 104, § 39—cited and compared.)—*Id.*

8. *False assessments void.*—An assessment in the name of a person who neither was nor ever had been the owner of the property, would be an utterly void assessment, and as against the owner of property cannot be made the foundation of a sale and conveyance of his land, even by legislative enactment.—*Id.*

9. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax-books, and collection of taxes, and return of delinquent tax-lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*

10. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863-4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.—*Id.*

11. *Laws exempting Lands from Taxation—Their effect.*—An act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent legislature.—Washington University v. Rowse, 308.

12. *Legislature—What Laws irrevocable; what not—U. S. Constitution—Construction.*—Each legislature is alike invested with the general powers of sovereignty. Therefore one cannot pass a law irrevocable or irrepealable in its character unless it has imparted to it something in the nature of a compact or contract which will preserve it inviolate under the inhibition of the national constitution.—*Id.*

13. *Taxation—Laws depriving Legislature of power of; how construed.*—A law which seeks to deprive the legislature of the power of taxation must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding. Every presumption will be made against its surrender, as the power was committed by the people to be exercised, and not alienated.—*Id.*

14. *Corporations—Laws exempting from taxation—Their effect.*—The legislature may, if there is no prohibition in the organic law to the contrary, exempt a corporation from taxation, but such exemption is in its nature *durante, bene placito*, and revocable by a subsequent act.—*Id.*

15. *Right of Taxation—Incident of popular sovereignty—Implied Powers.*—In a representative democracy, the right of taxing the citizen is an inseparable

REVENUE—(*Continued.*)

incident of popular sovereignty, and must be preserved unimpaired in order that the revenue and burdens necessary to support the government be not unequally distributed, or onerously imposed on any particular class. It is a branch of the legislative power, which always, in its nature, implies not only the power of making laws, but of altering and repealing them, as the exigencies of the State and circumstances of the times may require.—*Id.*

16. Case of Washington University v. Rowse (*ante*, p. 308) affirmed.—Home of the Friendless v. Rowse, 361.

17. *Revenue — Taxation — Property occupied by the National Government, when exempt.*—Property occupied by the national government will not be exempt from State taxation unless the title and ownership thereof be vested in the United States. Taxes are assessed against the real owner without any regard to temporary occupancy, and the obligation of payment follows the assessment.—Speed v. St. Louis County Court, 382.

18. *Revenue Act — Construction.*—Sections 19 and 20 of the revenue act of 1863 (Adj. Sess. Acts 1863, p. 69) contemplate an assessment on shares of stock held and owned by individual persons.—St. Louis Building and Savings Association v. Lightner, 421.

19. *Revenue Act — Design.*—The manifest object of these provisions was that the assessor might be thus provided with authentic information as to the persons who owned shares of stock in the corporation, in order that the shares might be properly assessed against them.—*Id.*

20. *Corporation — Capital Stock — Taxation.*—That portion of the capital stock of a corporation which has been invested in bonds of the United States is not subject to taxation by the State.—*Id.*

S

SET-OFF.

See ADMINISTRATION, 4. SURETIES, 7.

SHERIFF.

1. *Sheriff's Deed — Recitals.*—Where the plaintiff is bound to produce a judgment, the recitals in the deed under which he claims should conform to the judgment, in order that the court can see that the deed was made on the judgment.—Carpenter v. King, 219.

2. *Sheriff's Deed — Recitals — What, prima facie Evidence.*—A sheriff's deed which recites the date of the rendition of the judgment, the amount for which it was rendered, the names of the parties to the record, the time of filing the transcript, and the time when execution was issued, is sufficiently definite to render it *prima facie* evidence and shift the burden of proof upon the adverse party, if he denies its validity, even if it does not recite the name of the justice of the peace before whom it was rendered. Such recitals contained every material fact required by the statute relating to executions.—*Id.*

3. *Sheriff's Deed, presumptive evidence of its recitals — Burden of Proof.*—The sheriff's deed is presumptive evidence of the recitals contained in it, without any accompanying proofs; subject, however, to be destroyed or invalidated when attacked by a party resisting it. (McCormick v. Fitzmorris *et al.*, 39 Mo. 24, affirmed.)—*Id.*

SHERIFF—(*Continued.*)

4. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*—Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.—Kitchen v. Reinsky, 427.

ST. LOUIS, CITY OF.

1. *Water Commissioners—Water Licenses—Actions touching—Constitution—Statute—Subject Matter, how far must be embraced in title—Construction of § 32, art. 4, Const. Mo.*—An act entitled "An act amendatory of an act to enable the city of St. Louis to procure a supply of wholesome water, approved March 13, 1867" (Adj. Sess. Acts Mo. 1868, p. 291), after authorizing the Board of Water Commissioners to require owners, etc., of buildings to take out water-licenses, goes on to provide, in substance, that parties who fail or neglect to comply with the provisions of the section shall be subject to the same penalties as the parties who use the water of the city and fail or refuse to pay the rate or assessment for the same; *provided, however*, that the Board of Health shall, in the first instance, declare by resolution that in its judgment the use of water from the city water-works in the houses of such parties is demanded as a sanitary measure for the preservation of the health of the inmates: *Held*, that the section, although it confers extraordinary powers, relates clearly to the subject intimated in the title, and is entirely congruous and connected with it, and is valid under section 32 of article 4 of the constitution of this State. The only intention of that section of the constitution was to prevent the conjoining in the same act of incongruous matters, and of subjects having no legitimate connection or relation to each other; and if the title of an original act is sufficient to embrace the provisions contained in an amendatory act, it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. It is plain, however, that the use of the words "other purposes," which have been extensively used in the title to acts to cover any and every thing, whether connected with the main question indicated by the title or not, can no longer be of any avail.—City of St. Louis v. Tiefel, 578.

2. *Police Court—Jurisdiction—Actions touching Water Licenses.*—The St. Louis Police Court, being by the act establishing it limited to cases in which a justice of the peace would have had jurisdiction, or to those for violation of a city ordinance, or to cases of assault and battery, can have no jurisdiction over a complaint for violation of an act of the legislature in failing to take out a water-license; and, upon appeal to the Criminal Court, the case, upon motion, was properly dismissed for want of jurisdiction.—*Id.*

STATUTE, CONSTRUCTION OF.

See ADMINISTRATION, 6. ATTACHMENT, 2. AUDITOR, COUNTY, 2. COURTS, COUNTY, 1, 2, 3. DAMAGES, 1. EVIDENCE, 4, 16. EXECUTIONS, 1, 2, 3, 4. FRAUDULENT CONVEYANCES, 4. HUSBAND AND WIFE, 7, 8. JURISDICTION, 3. JUSTICES' COURTS, 1. LAND TITLES, 2, 10, 11, 12, 13. LAND-

STATUTE, CONSTRUCTION OF—(*Continued.*)

LORD AND TENANT, 4, 8. PRACTICE, CIVIL, 1—ACTIONS, 7, 10, 17—APPEALS, 9—PARTIES, 4—PLEADINGS, 1, 4, 7, 9, 11, 17—TRIALS, 9, 17. PRACTICE, CRIMINAL, 2. PUBLIC PRINTER. RAILROADS, 1. REGISTRATION. REVENUE, 1, 3, 6, 7, 10, 18. ST. LOUIS, CITY OF, 1. SURETIES, 5, 3, 7. TRESPASSES, 1. TRUSTS, 6.

SURETIES.

1. *Co-sureties — Risks assumed.* — It may be said, as a general rule, that co-sureties undertake to assume the same risks and responsibilities, and neither can gain any advantage over another, but all subject themselves to the same liabilities.— Seely's Adm'r v. Beck, 143.

2. *Sureties — Rights.*—Sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify themselves; and courts of equity hold them entitled, upon payment of the debt due by their principals to the creditor, to have the full benefit of all the collateral securities held by the creditor.—*Id.*

3. *Co-securities — Agents.*— Where A. and B. were co-securities on the bond of an administrator who became insolvent, and A., as security, was compelled to pay the amount in default, the fact that prior to the execution of the bond B. had entered into an agreement with the administrator to act as his agent in receiving and paying out moneys belonging to the estate of the deceased, in consideration of the payment to him of a portion of the commissions allowed the administrator by court, does not deprive B. of his position as surety and render him liable to A. as principal on the bond. That he was entitled by law primarily to administer, and waived his rights in favor of a public administrator, or that he had an interest in the estate, will not alter the case.—*Id.*

4. *Agent — Partner.*— Under such circumstances, B. would be liable only upon the assumption that the agreement created a partnership between himself and the administrator, and no partnership can exist in the office of administrator.—*Id.*

5. *Sureties — Notice to Sue — Waiver.*—Where the security upon a note gave the holder notice in writing to bring suit immediately, but delay was caused by defendant himself, he is presumed to have waived the requirements of the statute concerning the time within which such suits are to be brought. (Gen. Stat. 1865, p. 406, §§ 1, 2.)—Simpson v. Blunt, 542.

6. *Probate Court — Appeals — Bonds — Judgment against Securities.* — The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court.—Dubois' Adm'r v. Walsh, 273.

7. *Administration — Set-off against suit of Administrator, when admissible.*— The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the mis-

SURETIES—(*Continued.*)

conduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.—Shannon's Adm'r v. Dinan, 269.

T

TRESPASSES.

1. *Trespasses — Act concerning, contemplates what.*— The act concerning trespasses (Gen. Stat. 1865, ch. 76, § 1) contemplates voluntary or willful trespasses only, which are committed without any lawful right, and it inflicts penalties as upon a wrong-doer.— Schmidt v. Densmore, 225.

2. *Practice—Trespass—Action of, when brought—Construction of Statute.*— The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. Section 3, chap. 163, p. 653, Gen. Stat. 1865, does not apply to actions of that description, but contemplates those where the suit was in the nature of a proceeding *in rem* affecting the land itself.— Hannibal & St. Joseph R.R. Co. v. Mahoney, 467.

TRIAL.

See PRACTICE, CIVIL—TRIAL. PRACTICE, CRIMINAL.

TRUSTS.

1. *Husband and Wife—Marriage Settlements — How affected by debts of Husband, at law and in equity.*— The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.— Pawley v. Vogel, 291.

2. *Practice—Replevin—Trusts not recognized by action of.*— In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or of the equities of the wife.—*Id.*

3. *Husband and Wife — Wife's Trust Estate — What Proceedings to protect against Husband's Creditors.*— If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.— *Id.*

4. *Fraudulent Sales — Proceeds.*— Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity

TRUSTS—(*Continued.*)

as a substitution for the original property, and be subjected to the same trust.—Rutherford v. Williams, 18.

5. *Equity—Relief—How administered.*—Where there is any fraud touching property, courts of equity will interfere and administer a wholesome justice in favor of innocent persons who are sufferers by the fraud, without fault on their side, by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien.—*Id.*

6. *Execution—What Estates Vendible—Mere Trusts in Equity not Vendible.* The statute (R. C. 1855, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.—McIlvaine v. Smith, 45.

7. *Equity—Debtor and Creditor—Creditor's Bills—Equitable Interest—Trusts.*—A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man can not own property or money and not own it at the same time. He cannot be permitted to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction o such decree as may be rendered.—*Id.*

8. *Frauds—Resulting Trusts.*—A party who has acquired property or gained an advantage by means of his fraudulent acts should be declared a trustee for the benefit of him who is injured by such fraud.—Rutherford v. Williams, 18.

9. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust raised by implication to a certain proportion of the estate. When trust money is used by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.—White v. Drew, 561.

TRUSTS—(*Continued.*)

10. *Partition — Trust Estates, Dower in.* — The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*Id.*

11. *Garnishment — Trustees — Rents.*— Where one, as agent, collected rents for the trustee of another, and was garnisheed as debtor of the beneficiary, according to the decision of this court, in the case of McIlvaine v. Smith (*ante*, p. 45), these rents were a trust fund in the hands of the trustee until paid over by him to the beneficiary; and the agent could not be made liable, under this process, as debtor of the beneficiary, for rents collected as the agent of the trustee.— McIlvaine v. Lancaster, Garn., 96.

12. *Corporation — Dissolution — Effects — Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosesoever hands they may come.—Powell v. North Missouri Railroad Company, 63.

13. *Equity — Purchaser — Fraud — Relief.*— It is a well-settled principle of equity law that where one becomes a purchaser, under such circumstances as would make it a fraud to permit him to hold on to his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtain it at a sacrifice, the court will relieve against such fraud; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby.— McNew v. Booth, 189.

14. *Equity — Payment — Reasonable Time.*— Where, in case of property sold under a deed of trust, the debtor party is promised a reconveyance thereof upon payment of the money owing under the deed within a reasonable time, special circumstances, the situation of the parties, and the character of the property, must be taken into account in affixing the standard. Where a person became possessed of property in such a way that the law would have held him a trusteee, the lapse of time would make no difference.—*Id.*

See CORPORATIONS, 5.

U

USURY.

See EQUITY, 5. INTEREST, 2.

V

VENDOR AND PURCHASER.

See CONVEYANCES. EVIDENCE. FRAUDULENT CONVEYANCES, 4. LAND TITLES. LEASE. MORTGAGES AND DEEDS OF TRUST.

VERDICT.

See CRIMINAL LAW, 10. PRACTICE, CIVIL — TRIALS, 9 19. PRACTICE, CRIMINAL, 8.

W

WITNESSES.

1. *Witnesses—Deed of Trust—Testimony of Maker—Incompetency of, under Statute.*—Under the second subdivision of section six of the act concerning witnesses (R. C. 1855, p. 1578), testimony of the maker of a deed of trust, tending to show that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out, or that a large portion of it was the amount of an order for goods never delivered to him, and that, by the advice and direction of the parties for whose benefit the deeds were executed, this sum was falsely stated for the purpose of deterring his other creditors from proceeding against his property, was incompetent.—Byrne v. Becker, 264.

2. *Written Instrument—Ambiguity—Parol Evidence.*—Where the matter is uncertain, on the face of the instrument, whether it was designed to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation.—Musser v. Johnson, 74.

3. *Actions—Malicious Prosecutions—Declarations.*—In such actions, declarations of the defendant to show that he was not actuated by malice in commencing the prosecution are inadmissible.—Moore v. Sauborin, 490.

4. *Fraud—Evidence.*—In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.—Hubble v. Vaughan, 138.

5. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 287, § 5), it must appear that she conducted the business or transaction about which she was testifying.—Hardy v. Matthews, 406.

6. *Criminal Law—Conspiracy—Evidence—Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the acts of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.—State v. Louisa Daubert, 239.

7. *Criminal Law—Conspiracy—Evidence—Order of introduction of testimony.*—Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.—*Id.*

8. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible*—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where

WITNESSES—(*Continued.*)

the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.— State v. Henry Daubert, 242.

9. *Practice, Criminal — Evidence — Verdict.*— If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.— *Id.*

10. *Witnesses — Husband and Wife — Information.*— The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also render her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.— State v. Berlin, 572.

11. *Practice — Trials — Evidence — Instructions — Error.*— If there be any competent evidence presented to support an issue, it is error in the court to instruct the jury that the party is not entitled to recover.—Deere v. Plant, 60.

12. *Trial — Evidence — Jury.*—Where any evidence exists tending to show facts which constitute a good defense, the case ought not to be taken from the jury.— Benton v. Klein, 97.

13. *Practice — Trial — Instructions — Evidence tending to prove an issue always submitted to a jury.*— An instruction declaring that upon the evidence a claimant cannot recover, is only justified or warranted where there is a total and complete failure of evidence to uphold a verdict. Where there is any evidence tending to prove the issue, it must be submitted to the jury.—Claflin v. Rosenberg, 439.

See EVIDENCE, 4. PRACTICE — PLEADING, 1, 6.

ADDENDA.

DAMAGES—(*Continued.*)

1. *Contracts — Stipulations — Penalties — Liquidated Damages.*—Plaintiff made an agreement in writing with defendant, concerning the sale of certain lands, by the terms of which nine thousand dollars of purchase money was to be paid at a day and place named, and two notes to be given in the sum of six thousand dollars each, payable in one and two years from date — payment of the notes to be secured by deed of trust on the land. On the payment of the purchase money and the execution of the notes and deed of trust, plaintiff was to give defendant a warranty deed for the property. The agreement further stipulated that "either party failing to comply with its provisions shall forfeit and pay to the other the sum of two thousand dollars." *Held*, that this stipulation should be treated as one for liquidated damages, and not one for a penalty.— Morse v. Rathburn, 594.

2. *Contracts — Stipulations — Liquidated Damages.*—Where the parties have agreed that, in case one of them shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conven-

DAMAGES—(*Continued.*)

tional amount of damages sustained by such omission, courts will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages; *provided*, that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury.—*Id.*

3. *Contracts — Stipulations — Penalties — Liquidated Damages.*— When an agreement contains several distinct covenants on which there may be diverse breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, then the contract will be treated as one for a penalty, and not for liquidated damages. But where the parties to a contract, in which the damages to be ascertained growing out of it are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, in language plainly expressive of such agreement, and when the intention is plain and palpable, there is no law to justify the courts in giving the contract a different construction.—*Id.*